DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1399
Title: Dana Roberts, Petitioner
v.
Sea-Land Services, Inc., et al.
Docketed: May 13, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-70268)
Decision Date: November 10, 2010
Rehearing Denied: February 10, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 11 2011	Petition for a writ of certiorari filed. (Response due June 13, 2011)
Jun 8 2011	Order extending time to file response to petition to and including July 13, 2011.
Jul 11 2011	Order further extending time to file response to petition to and including July 20, 2011.
Jul 20 2011	Brief of respondent Federal Respondent in opposition filed.
Aug 3 2011	DISTRIBUTED for Conference of September 26, 2011.
Aug 9 2011	Reply of petitioner Dana Roberts filed. (Distributed)
Sep 27 2011	Petition GRANTED limited to Question 1 presented by the petition.
Nov 3 2011	Motion to dispense with printing the joint appendix filed by petitioner Dana Roberts.
Nov 14 2011	SET FOR ARGUMENT ON Wednesday, January 11, 2012.
Nov 14 2011	Brief of petitioner Dana Roberts filed.
Nov 18 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Nov 18 2011	CIRCULATED.
Nov 21 2011	Brief amicus curiae of The American Association for Justice filed. (Distributed)
Nov 22 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 14 2011	Brief of respondents Sea-Land Services, Inc., et al. filed. (Distributed)
Dec 14 2011	Brief of respondent Director, Office of Workers' Compensation Programs filed. (Distributed)
Dec 15 2011	Record received from U.S. Dept. of Labor Benefits Review Board. (1 Box)
Dec 21 2011	Motion for divided argument filed by the Solicitor General.
Dec 30 2011	Motion for divided argument filed by respondent GRANTED.
Jan 4 2012	Reply of petitioner Dana Roberts filed. (Distributed)
Jan 11 2012	Argued. For petitioner: Joshua T. Gillelan, II, Washington, D. C. For federal respondent: Joesph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For private respondent: Peter Keisler, Washington, D. C.

Mar 20 2012	Adjudged to be AFFIRMED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ., joined. Ginsburg, J., filed an opinion concurring in part and dissenting in part.
Apr 23 2012	JUDGMENT ISSUED.
May 2 2012	Record returned to U.S. Department of Labor Benefits Review Board.

PETITION FOR WRIT OF CERTIORARI

Supreme Court

No. 10-1399 MAY 11 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., and KEMPER INSURANCE CO., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("Longshore Act") provides generally for compensation for total disability in periodic payments at a rate of two-thirds of the "average weekly wage of the injured employee at the time of the injury," and for most *partial* disabilities the same fraction of the difference between that weekly wage and the worker's residual "wage-earning capacity." *Id.* §§ 8-10, 33 U.S.C. §§ 908-10. But it has always imposed upper and lower limits on the rate payable as so determined. Section 6(b) of the Act, 33 U.S.C. § 906(b), provides that the compensation rate cannot be more than twice "the applicable national average weekly wage," as determined for each fiscal year; nor can compensation for total disability be less than the lesser of half the "applicable national average weekly wage" so determined and the worker's full pre-injury earnings. The question which fiscal year's limits are the "applicable" ones is addressed by § 6(c):

> Determinations under subsection (b)(3) of this section with respect to a [fiscal year] shall apply to employees or survivors *currently receiving compensation* for permanent total disability or death benefits *during* such period, as well as those *newly awarded compensation during* such period.

QUESTIONS PRESENTED – Continued

33 U.S.C. § 906(c). The identity of the years whose limits are "applicable" under this provision has divided the two courts of appeals with the heaviest Longshore Act dockets.

The questions presented are simple and straightforward:

1. Whether the phrase "those *newly awarded* compensation during such period" in Longshore Act § 6(c), applicable to all classes of disability except permanent total, can be read to mean "those first *entitled to* compensation during such period," regardless of when it is *awarded*.

2. Whether the phrase "employees or survivors *currently receiving* compensation for permanent total disability or death benefits during such period" in § 6(c) can likewise be read to mean those "*entitled to* [such] compensation during such period," without reference to when it is *received*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 625 F.3d 1204. The decisions of the Benefits Review Board (Pet. App. 14) and the Administrative Law Judge (Pet. App. 33, 28) are unreported.[1]

JURISDICTION

The decision of the Benefits Review Board was a "final order of the Board" within the meaning of § 21(c) of the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. § 921(c), because it put an end to all administrative proceedings on Roberts's claim. Because Roberts's injury occurred in Dutch Harbor, Alaska, within the territorial jurisdiction of the Court of Appeals for the Ninth Circuit, that court had jurisdiction of Roberts's timely petition for review under § 21(c). The opinion of the court below was entered on November 10, 2010. The order denying rehearing was entered on February 10, 2011 (Pet. App. 110). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The administrative decisions are, however, available at www.dol.gov/brb/decisions/lngshore/unpublished/Nov07/07-0382.pdf and www.oalj.dol.gov/Decisions/ALJ/LHC/2005/DR_v_SEA-LAND_SERVICES_2005LHC02193_%28OCT_12_2006%29_193756_CADEC_SD.PDF (May 9, 2011) (all dates appended to web addresses herein are the dates the sites were last visited).

STATUTORY PROVISIONS INVOLVED

The only directly relevant provisions of the Longshore Act are those of § 6(b)-(c), 33 U.S.C. § 906(b)-(c), as amended in 1972 and reenacted without substantive change (other than extension to death-benefits cases) in 1984[2]:

> (b)(1) Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> (2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this Act are less than 50 per centum of

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[2] As amended by Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1251, 1252 (Oct. 27, 1972), and Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 6, 98 Stat. 1639, 1641 (Sept. 28, 1984). This Court had held that the 1972 amendments left no maximum-rate limitation applicable to death cases. *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979). The Court there examined the 1972 version of the same provisions here at issue, but only to determine whether they established maximum-rate limitations for death benefits (which they did not, but as a result of the 1984 amendment now do).

such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. . . .

(c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

STATEMENT OF THE CASE

1. The Longshore Act requires an employer to compensate a worker disabled by a covered employment injury by periodic payments at a rate based on two-thirds of the worker's average weekly wage at the time of the injury, or, for most partial disabilities, two-thirds of the difference between that wage and the worker's residual earning capacity. *Id.* § 8(a), (b), (c)(21), (e), 33 U.S.C. § 908. The figure calculated under § 8, however, is subject to upper and lower

limits established under § 6(b)-(c), set out above. Section 6(b)(3) directs the Secretary of Labor[3] to determine, by October 1 of each year, the national average weekly wage to apply to "the period beginning with October 1 of that year and ending with September 30 of the next year." Even if two-thirds of the worker's lost earning capacity is greater, compensation cannot be payable at more than twice the "applicable" national average weekly wage; and even if two-thirds of the pre-injury earnings is less, compensation for *total* disability cannot be less than half the "applicable" national average (unless the full pre-injury wages were less than that, in which case such full wages are payable). Section 6(c) of the Act specifies which annual determination of the national average is "applicable":

> Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

2. Dana Roberts slipped and fell in the course of his work as a longshoreman for Respondent Sea-Land

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[3] The Secretary has long delegated authority to make this determination, along with her other powers and duties under the Act, to the Director of the Office of Workers' Compensation Programs (OWCP). *See* Secretary's Order No. 10-2009, 74 Fed. Reg. 58834 (Dep't of Labor Nov. 13, 2009).

Services, at its marine terminal in Dutch Harbor, Alaska, on February 24, 2002. *E.g.*, Pet. App. 65. The injuries to his shoulder and cervical spine required surgery and ultimately left him permanently partially disabled, ending his longshore career (Pet. App. 79-93, 97-107). Sea-Land's insurer under the Act, Respondent Kemper, paid Roberts compensation for temporary total disability for periods in 2002-2005 at a rate that was less than any applicable maximum, and paid for some medical treatment, but as of May 2005 it disputed Roberts's claim, and stopped paying anything (Pet. App. 46, 51-52, 101).

3. Following a hearing, an administrative law judge ("ALJ") issued a decision in October 2006 (Pet. App. 33-109) finding that Sea-Land was liable under the Act for both the shoulder condition and the cervical-spine condition, and awarding Roberts compensation for temporary total disability from March 2002 to July 2005, for permanent total disability from July 12 to October 9, 2005, and for permanent partial disability from October 2005 forward (Pet. App. 97-107). The ALJ determined that Roberts's average weekly wage at the time of the injury was $2,853.08, and that he had a residual weekly earning capacity as of October 2005 of $720 (Pet. App. 93-97, 103-07). Since not only the former figure but the difference between the two figures was greater than three times the national average wage in any year to date,[4] two-thirds of his

[4] The national average weekly wages, and consequent maximum and minimum rates, for each fiscal year from 1973

(Continued on following page)

loss was greater than twice the national average, and the "applicable" maximum rate or rates under Longshore Act § 6(b)-(c) would control the weekly rate payable for each of Roberts's classes of disability. The ALJ, without discussion, ordered Sea-Land to pay compensation for each period of disability at what he referred to as "the maximum rate for *injuries occurring*" during fiscal 2002, $966.08, "plus any increases required under section 6 of the Longshore Act" during the period of permanent total disability (Pet. App. 107).

Roberts moved for reconsideration, arguing that the compensation rate should be $1,114.44, based on the national average weekly wage for FY 2007, when the ALJ's award was filed, in reliance on *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997). Roberts acknowledged, however, that the Benefits Review Board's decision in *Reposky v. Int'l Terminal Services*, 40 Ben. Rev. Bd. Serv. (MB) 65, 73-77 (2006), issued between the ALJ's decision and the motion for reconsideration, controlled, and pointed out that even under that decision, the local OWCP "district director" had calculated, and Kemper had paid, less than was due for the part of Roberts's permanent total disability in fiscal 2006; the ALJ accordingly denied reconsideration, but held that under *Reposky*, the appropriate rate for the final nine

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(national average $131.80) to 2011 ($628.42), are tabulated on the OWCP's web site, at www.dol.gov/owcp/dlhwc/NAWWinfo.htm (May 9, 2011).

days of permanent total disability, in FY 2006, should be that year's maximum of $1,073.64 (Pet. App. 28-32).

4. Both Sea-Land and Roberts appealed the decision of the ALJ to the Benefits Review Board, which affirmed the order in all respects (Pet. App. 14).[5] With respect to the "applicable" years' maximum rates under § 6(c), the Board, adhering to its decision in *Reposky*, applied the limit for the year in which Roberts suffered his disabling injury to the compensation for all periods of his disability except the nine days of continuing permanent total disability in fiscal 2006. In *Reposky*, the Board had refused to depart from its previous interpretation of § 6(c), despite the decision to the contrary of the Fifth Circuit in *Wilkerson*. The Board reasoned that "the applicable maximum rate is the one in effect when the disability commences" (*Reposky*, 40 BRBS at 76) because the Senate committee report on the 1972 Amendments had characterized the maximum as applying to "those who begin receiving compensation for the first time during the period" (S. REP. NO. 92-1125, at 18 (1972), *quoted in Puccetti v. Ceres Gulf*, 24 Ben. Rev. Bd. Serv. (MB) 25, 31 (1990)). The Board adopted the Director's rationale that "newly awarded compensation during such period" should be read to mean *entitled* to compensation *for disability beginning*

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[5] Sea-Land challenged the ALJ's ruling that Roberts's injury fell within the statutory coverage of the Act (Pet. App. 66-78); it did not seek review of the Board's affirmance (Pet. App. 20-26) of that decision.

during such period, i.e., *first entitled to* compensation during such period, in order to "maintain[] consistency in the statute and yield[] rational results." *Reposky*, 40 BRBS at 76. With respect to the "currently receiving" clause of § 6(c), applicable to *permanent total* disability, the Board adhered to its ruling in *Reposky* that not only should "receiving" be taken to mean *entitled to*, but "during such period" should be read to mean "at the beginning of such period," so that the compensation rate for such disability, from the time of permanency, remains at the maximum for the year in which the first disability commenced, and increases only after the end of the fiscal year in which the disability becomes permanent total, to the limit for the succeeding year. *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 77; Pet. App. 20.

5. On Roberts's petition for review, the court below affirmed the decision of the Benefits Review Board with respect to the compensation owed Roberts for his period of temporary total disability and for his ongoing permanent partial disability, concluding that "an employee is 'newly awarded compensation' within the meaning of section 6(c) when he first becomes entitled to compensation" (Pet. App. 9-10). The court acknowledged that the term "award" ordinarily refers to an adjudication and means a formal compensation order in some sections of the Longshore Act, but perceived that in other sections the terms "award" and "awarded" "refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order" (Pet. App. 6-8). Further, because both

the employee's average weekly wage and the residual wage-earning capacity, each used in determining the amount of compensation payable, are to be calculated as of the time of injury, "[t]o apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled would be to depart from the Act's pattern of basing calculations on the time of injury" (Pet. App. 8-9).

The court below disagreed with the conclusion of the Fifth Circuit in *Wilkerson*, 125 F.3d at 906, that the "newly awarded compensation during such period" clause unambiguously makes the time an award is first entered determinative of the applicable year's limits, because it viewed the *Wilkerson* court as having "resolved the issue summarily and without expressing any reasoning" (Pet. App. 9). The court perceived that making the time an award is entered determinative "would have the potential for inequitable results." It rejected Roberts's point that the effect would simply be to encourage employers to expedite instead of delay the proceedings leading to an award; it reasoned that § 14(e) of the Act, 33 U.S.C. § 914(e), "already provides penalties for delay by an employer" (Pet. App. 9 n.1).

The court reversed part of the Board's decision, however, with respect to Roberts's period of permanent total disability, governed by the "currently receiving compensation" clause of § 6(c) (Pet. App. 10-12). Just as it had read "newly awarded compensation during" to mean "first entitled to compensation during," it read "currently *receiving* compensation for

permanent total disability during" to mean "currently *entitled to* [such] compensation during":

> We believe the statute is clear: The "currently receiving" clause of section 6(c) unambiguously refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually paid it.

Pet. App. 12. Thus the compensation payable for Roberts's initial period of such disability, beginning in July 2005, was subject to that year's maximum (even though he did not *receive* it until fiscal 2007), not the 2002 limit applied by the Board (*id.*).

REASONS FOR GRANTING THE PETITION

1. This case presents a straightforward question of statutory construction. As this Court has made clear in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), concerning the distinction between *entitlement to* compensation under the Act and *award or payment* of such compensation,

> [i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

The Fifth Circuit in *Wilkerson*, 125 F.3d at 906, recognized that § 6(c) "speaks with clarity" to the question which year's maximum applies to an award of compensation and, indeed, expresses an "unequivocal statutory imperative" that the maximum for the year in which the award is made applies. This Court should grant certiorari on the first issue because the decision of the court below is in direct conflict with the decision of the Fifth Circuit in *Wilkerson*. The issue is important because it arises in at least scores of cases, and probably hundreds – Respondent Director, OWCP, can no doubt provide firm numbers – every year.

The divergent readings of § 6(c) govern the rate at which compensation is payable in all cases in which the injured workers were earning more than three times the national average weekly wage (so as to implicate the maximum rates), and in all total-disability cases in which the worker was earning less than three-quarters of the national average (so that the § 6(b)(2) minimum-rate provision governs). Earnings high enough to implicate the maximum rate are not uncommon among senior longshore workers, and some other maritime employees with specialty skills also have such wages; and they are especially prevalent among American workers employed by U.S. government contractors overseas, covered by the Longshore Act's extension by the Defense Base Act, .2 U.S.C. §§ 1651-54, under which some nine thousand

injuries and deaths were reported in fiscal 2010.[6] Earnings low enough to bring the minimum rates into play are especially common among *locally*-hired overseas contractors' employees, and among workers covered by another of the Longshore Act's extensions, the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73. And the two courts of appeals that have reached conflicting conclusions are those with the most active dockets under the Act and its extensions.

Consideration of the second question is essential in order to understand the statutory provision in context and as a whole. This question likewise affects not only all permanently totally disabled claimants whose compensation is affected by the maximum rate, but also all such claimants whose compensation is controlled by the minimum rate.

In addition, the decision of the court below conflicts in principle, as to each clause of § 6(c), with this Court's decision in *Estate of Cowart*, *supra*.

Petitioner submits that *Wilkerson* is clearly correct and consistent with *Estate of Cowart*, that the court below did not construe the statutory terms but blatantly "reformed" them so as to accord with the court's view of what Congress would *better* have

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[6] *See* U.S. Dep't of Labor, Office of Workers' Compensation Programs, Division of Longshore and Harbor Workers' Compensation, "Longshore Performance Page," www.dol.gov/owcp/dlhwc/LongshoreProgramPerformanceResults.htm (May 9, 2011).

provided, and that each relevant phrase of § 6(c) is just as clear in statutory context as it would be in isolation, calling for summary reversal.

2. The LHWCA "creates a comprehensive federal scheme to compensate" workers who are injured in the course of covered employment. *Cowart*, 505 U.S. at 471. While the Act requires that compensation for such an injury be paid promptly "without an award" unless the employer files a notice "controvert[ing]" liability (§ 14(a), (d)-(e), 33 U.S.C. § 914(a), (d)-(e)), it provides administrative procedures both for prompt issuance of awards in undisputed claims (subject to "modification" if and when a dispute develops thereafter[7]) and for formal-hearing proceedings to resolve disputed claims (Act § 19(b)-(e), 33 U.S.C. § 919(b)-(e)). In either event, § 19(e) provides for formal filing and service of "[t]he *order* rejecting

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[7] *See* Longshore Act § 22, 33 U.S.C. § 922; *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (re breadth of "mistake" ground); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (same); *Stansfield v. Lykes Bros. S.S. Co.*, 124 F.2d 999, 1005 (5th Cir. 1941) ("neither stipulation nor agreement" underlying original award "will estop [parties], or in any manner prevent [them], from" correction of errors through § 22); *Pistorio v. Einbinder*, 351 F.2d 204, 206 (D.C. Cir. 1965) (same); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 545 (7th Cir. 2002); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995) ("*Rambo I*") (re breadth of "change in conditions" within the meaning of § 22).

the claim or *making the award* (referred to in this Act as a compensation order)[.]"[8]

The interchangeable terms "award" and "compensation order" thus have specific meaning under the LHWCA, and specific consequences flow from the entry of an "award." For example, an employer that fails to pay compensation "payable under the terms of *an award*" within ten days, absent a stay of the award pending review, is liable for a twenty-percent augmentation of the amount otherwise due under the award. Act § 14(f), 33 U.S.C. § 914(f). If an employer is in "default" of "payment of compensation due *under any award of compensation*" for thirty days, the person entitled to compensation may seek a "supplementary order" from the district director declaring the amount in default, on which a judicial judgment can be entered by a federal district court, under § 18(a), 33 U.S.C. § 918(a); and if the award has become "final," resort to mandatory-injunction proceedings directly in district court is available to

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[8] While the Act refers to the initial formal-hearing proceeding as occurring before a "deputy commissioner" (a term for which "district director" has been administratively substituted, *see* 20 C.F.R. §§ 701.301(a)(7), 702.105)), all powers of the deputy commissioners "with respect to hearings" were transferred to administrative law judges in 1972. Longshore Act § 19(d), 33 U.S.C. § 919(d). Thus, in cases in which no hearing is promptly ordered, the last sentence of § 19(c) directs the district director to issue a compensation order; if a dispute requiring a hearing exists, it must be addressed by an ALJ in a compensation order to be filed and served by the district director (*see* 20 C.F.R. § 702.348-.350).

enforce compliance under § 21(d), 33 U.S.C. § 921(d). If the employer becomes insolvent, compensation owed pursuant to an award may be paid by the Secretary of Labor out of the industry-financed "special fund" established by § 44 of the Act, 33 U.S.C. § 944, under § 18(b), 33 U.S.C. § 918(b). A claimant's acceptance of compensation *under an award* operates as an assignment to the employer of all rights against a third person who may be liable for the injury in tort, unless the claimant brings suit against such a third person within six months after such acceptance, under § 33(b), 33 U.S.C. § 933(b). And the Secretary has discretion to "furnish such prosthetic appliances or other apparatus [as is] made necessary by an injury *upon which an award has been made* under th[e] Act," § 39(c)(2), 33 U.S.C. § 939(c)(2).

The payment of compensation "*without* an award," on the other hand, has different consequences under the Act. Payment is due "without an award, except where liability to pay compensation is controverted by the employer" by filing a "notice" stating the grounds. Act § 14(a), (d), 33 U.S.C. 914(a), (d). While a claim must otherwise be filed within a year of injury, "[i]f payment of compensation has been made without an award," the year runs from the date of the last such payment. Act § 13(a), 33 U.S.C. § 913(a). If "compensation payable without an award [because no notice of controversion has been filed] is not paid within 14 days after it is due," the employer is liable for a ten-percent augmentation of the amount otherwise owed. Act § 14(e), 33 U.S.C. § 914(e). But as long

as it files a § 14(d) notice, the employer is free to terminate payments "without an award" at any time, without incurring any compensation liability beyond that eventually determined or acknowledged to have been payable. And acceptance of payments made without an award does not trigger the time after which a cause of action against a third party is assigned to the employer under § 33(b) – and did not do so even before the 1984 amendment to § 33(b) added the current level of specificity on the point in the subsection's last sentence. *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983).[9] Payments under awards and payments made "without an award" have entirely different status under the Act.

The court of appeals's theory that "award" does not have a consistent meaning throughout the Act, and that the time a claimant is "newly awarded compensation" within the meaning of § 6(c) can therefore be taken to refer to the time he or she is first *entitled to* compensation, was the court's own invention. The Board never relied upon any such

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[9] The perception of the court below that the final sentence of § 33(b), explicitly stating that "[f]or the purposes of this subsection, the term 'award' with respect to a compensation order means a formal order[,]" "would be unnecessary" if "award" were not "used in other sections to mean something broader," Pet. App. 8, is fallacious. In fact that sentence was added to § 33(b) in 1984; it had been included in the bill that became the Longshore Act Amendments of 1984, n.2 *supra*, *before* this Court's decision in *Pallas Shipping*; as that decision established, the added sentence *was* "unnecessary."

theory, nor did the Director, OWCP, either in urging the result in *Reposky* or in urging its acceptance in the proceedings below. Both the Board and the Director accepted the settled and consistent meaning of an "award" under the Act and the proposition that a claimant cannot be said to have been "awarded" compensation other than by a § 19(e) "compensation order," "making the award," *ibid.* They reasoned instead that *"during such period"* could be taken to modify, not "newly awarded," but "compensation," or rather an implicit term, "disability," so that "newly awarded compensation during such period" means "entitled to compensation *for disability that began* during such period." The court of appeals did not accept that tortured, syntactically impossible reading, which in any event denies all effect to the term "newly awarded."[10] It based its reading instead on rejection

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[10] The Director's contention before the Board in *Reposky* (and before the court of appeals below) that "newly awarded compensation during such period" means "newly awarded compensation *for disability commencing* during such period" is belied not only by the syntax of the phrase, in which "during such period" modifies "newly awarded" rather than "disability" (which does not even appear in the phrase), but further by the fact that the same Congresses that passed and reenacted § 6(c) in 1972 and 1984 used phrases *elsewhere* in the same amendments to the Act that *did* unambiguously provide the determinant the Director and the Board read into the different terms of § 6(c). Longshore Act § 10(h)(1) ("compensation to which an employee or his survivor *is entitled* due to total permanent *disability* or death *which commenced* or occurred prior to enactment"), § 33(g) ("entitled to compensation" at the time of entry into a third-party tort settlement). The use of a phrase with a completely different natural signification in § 6(c)

(Continued on following page)

of the proposition that the Board and the Director had never questioned: that "awarded" means "awarded" rather than "entitled to."

The court's purported discovery of uses of the term "award" or "awarded" in the Act that "could not have meant 'assigned by formal order,'" Pet. App. 6-8,[11] is illusory. The uses of the terms "shall be awarded" and "the award of compensation" in § 8(c)(20), (22), reflect no necessary or natural inconsistency with the meaning of "the award" provided by § 19(e), and do not even suggest, much less require, that those terms "refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal [compensation] order," Pet. App. 6-7. Likewise, § 10(h)(1), providing for an initial adjustment to post-1972 rates in cases in which "total permanent disability or death . . . commenced or occurred prior to enactment" of the 1972 amendments – and in which the compensation payable had

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forecloses reading that provision as if it had used one of those formulations. The Director's contention has never been promulgated in any implementing regulation or even disseminated in any of the Director's less formal pronouncements ("Program Memoranda" and "Industry Notices"). Accordingly, it does not qualify for any deference beyond "respect proportional to its 'power to persuade,'" *e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), and it has none.

[11] The court added "in the course of adjudication," Pet. App. 6, but as § 19(c) makes plain, compensation orders making awards are not intended to be confined to cases in which a dispute requires "adjudication," but are to be entered promptly, as a matter of course, if a claim is initially undisputed, subject to later modification under § 22 under the same procedures.

therefore been subject to the much lower previous limits of employer liability – explicitly makes the time of "commence[ment]" of such disability or "occur[rence]" of the death – *not* the time of an "award" – the critical determinant. The fact that it refers both to "the compensation to which an employee or his survivor is entitled," in its opening clause describing what is subject to the post-1972 "adjust[ment]," and to compensation that has been "awarded" at less than the maximum rate provided at the time of a pre-1972 injury, in a proviso, does not remotely justify the conclusion of the court of appeals that "entitled to" and "awarded" are "used . . . to mean the same thing" in § 10(h)(1), Pet. App. 7.

3. This Court also has specifically rejected the converse of the argument relied on by the court below – that "person entitled to compensation" could be read to encompass only claimants receiving compensation or having an award of compensation at the relevant time. *Cowart*, 505 U.S. at 476.[12] Section 33(g) of the Act, as amended by the same 1972 amendments as the provisions here involved, provides that a "person entitled to compensation" who enters into a settlement with a liable third party without first obtaining the employer's approval forfeits the right to compensation and medical benefits from the employer. The Director and the Board there (just as here) had considered the consequences of applying the statutory terms according to their natural meaning,

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[12] The court of appeals did not mention *Cowart*, despite Roberts's central reliance on it.

so as to encompass *unpaid* claimants, anomalous and unduly harsh, and so had read "entitled to compensation" to mean "*receiving* compensation or having been awarded it"; and (again as here) the Ninth Circuit had agreed, but the Fifth Circuit had held that the unambiguous meaning of the phrase employed by Congress controlled and foreclosed the paid-or-awarded reading. This Court there agreed with the latter:

> Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right.

Cowart, 505 U.S. at 477. The Court held that the forfeiture provision applied unambiguously to a claimant who did have a right to compensation under the Act when he settled a third-party tort claim, even though the employer was denying such entitlement, and no award had been entered or payments made, at the time. "[T]he stark and troubling possibility" that that rule would have harsh results, "creat[ing] a trap for the unwary" and providing a tool for employers to avoid liability for disabling injuries suffered in their employ, was an insufficient ground for avoidance of its clear terms; as the Court concluded:

> It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has

> done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Id. at 483-84.

By a parity of reason, the normal meaning of "those newly awarded compensation" requires more than that the claimant qualifies for the right to compensation, i.e., is *entitled to* it. As the court below began by acknowledging, the verb "award" has a settled legal meaning, requiring a legal document *establishing* an entitlement or liability (Pet. App. 6). Just as "entitled to compensation" cannot be read to mean "awarded or receiving compensation," so neither "newly awarded compensation" nor "currently receiving compensation for permanent total disability or death" can be read as "newly entitled to" or "currently entitled to" compensation. The present issues should be controlled by *Cowart*.

Nor will application of the clear meaning of the statutory terms in this case have harsh effects. Rather, following the statute as written will simply provide a claimant with a higher benefit, at a concomitant cost to the employer, if entry of an award is substantially delayed.

4. With respect to the other critical phrase of § 6(c), applicable to Roberts's compensation for his period of *permanent* total disability, the Ninth Circuit's holding that the "'currently receiving' clause of section 6(c) unambiguously refers to the period during which an employee was entitled to receive

compensation for permanent total disability, regardless of whether his employer actually paid it" (Pet. App. 12), is an even more blatant example of judicial legislation than its reading of "newly awarded." No dictionary could define "receiving" to mean "entitled to receive" as did the court below. The court did not even attempt to cover its amendment of that phrase with a fig leaf of reference to other provisions of the Act that use "receiving" to mean "entitled to," as there are, of course, not even arguably any such provisions. Only by ignoring the plain language of the statute could the court below justify its conclusion that the maximum compensation available for permanent total disability is that "applicable" during the year when the permanent total disability *exists*, even though the claimant is not paid – and therefore does not "receive" in any conceivable sense of the word – compensation for such disability until years later.

5. The concern of the court of appeals for potential inequitable results if the plain meaning of the language of § 6(c) is followed, Pet. App. 9 n.1, is misplaced. Imposing a cost on an employer that delays the payment of compensation by litigation is fully consistent with the Longshore Act's goal of encouraging prompt payments contemporaneous with the disability for which it is payable. The fact that this goal is also reflected in statutory provisions requiring, under defined circumstances, augmentation of compensation that is not promptly paid (§ 14(e), (f), 33 U.S.C. § 914(e), (f)) neither undercuts the consistent result of applying § 6(c) as written, nor renders the result of that plain meaning either

unnecessary or duplicative, as the court reasoned (Pet. App. 9 n.1). An employer can avoid paying the augmented compensation under § 14(e) to which the court of appeals referred simply by filing a notice "controverting" the claim, as Sea-Land did here. Imposing an extra liability on the employer where the claimant's receipt of compensation, and of the security of an award that ensures its continued payment until such time as the award may be modified, is delayed by litigation is fully consistent with the purposes of the Act. The decision of the Fifth Circuit in *Wilkerson* not only reflects the natural meaning of the words of the statute, but also results in an application of the statutory terms that is consistent with the statutory purpose. The Ninth Circuit's decision in this case does neither.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANA ROBERTS, *Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; SEA-LAND SERVICES, INC., *Respondents,* KEMPER INSURANCE COMPANIES, *Real Party in Interest.*	No. 08-70268 OWCP No. BRB No. 07-0382 OPINION

On Petition for Review of an Order of the
Office of Workers' Compensation Programs

Argued and Submitted
October 7, 2009—Portland, Oregon

Filed November 10, 2010

Before: Diarmuid F. O'Scannlain and N. Randy Smith, Circuit Judges, and Ronald M. Whyte, Senior District Judge.*

Per Curiam Opinion

COUNSEL

Joshua T. Gillelan II, Longshore Claimants' National Law Center, Washington, DC, argued the cause for

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* The Honorable Senior United States District Judge for the Northern District of California, sitting by designation.

the petitioner, and filed the briefs. Michael F. Pozzi, Renton, Washington, was also on the briefs.

Frank B. Hugg, Oakland, California, argued the cause for respondents Sea-Land Services, Inc. and Kemper Insurance Companies, and filed the brief.

Matthew W. Boyle, U.S. Department of Labor, Washington, DC, argued the cause for the Federal Respondent, Director, Officer [sic] of Workers' Compensation Programs, and filed the brief. Gregory F. Jacob, Rae Ellen James, and Mark A. Reinhalter, U.S. Department of Labor, Washington, DC, were also on the brief.

OPINION

PER CURIAM:

We consider the maximum weekly rate that applies to an employee's compensation for disability under the Longshore and Harbor Workers' Compensation Act.

I

A

The Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. § 901 *et seq.*, requires employers to compensate maritime employees for "disability or death [that] results from an injury occurring upon the navigable waters of the United States," *id.* § 903(a). Calculating the statutorily required rate of compensation for disability generally involves the following steps. First, we determine the

"average weekly wage of the injured employee at the time of the injury." *Id.* § 910. Then, we adjust the employee's average weekly wage to account for both the character (total or partial) and the quality (permanent or temporary) of the injury. *Id.* § 908(a)-(e). As relevant here, the Act entitles an employee to compensation in the amount of two-thirds' his average weekly wage in the case of permanent total or temporary total disability, *id.* § 908(a)-(b), and two-thirds' the difference between his average weekly wage and his residual wage-earning capacity in the typical case of permanent partial or temporary partial disability, *id.* § 908(c)(21), (e).

Finally, we ensure that the resulting rate accords with the requirements set forth in section 6 of the Act. Among other things, section 6(b)(1) provides that the rate of compensation "shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary [of Labor]." *Id.* § 906(b)(1). Each fiscal year, the Secretary calculates a new national average weekly wage, which governs "the period beginning with October 1 of that year and ending with September 30 of the next year." *Id.* § 906(b)(3). Under section 6(c), "[d]eterminations [of the national average weekly wage] with respect to a period shall apply to employees . . . currently receiving compensation for permanent total disability . . . during such period, as well as those newly awarded compensation during such period." *Id.* § 906(c).

B

On February 24, 2002, while working as a gatehouse dispatcher in Dutch Harbor, Alaska, for Sea-Land Services, Inc., Dana Roberts slipped on a patch of ice. Having injured his neck and shoulder, Roberts ceased work on March 11, 2002, and sought compensation under the LHWCA.

After initially making some payments to Roberts, Sea-Land and its insurer stopped paying him compensation in May 2005. The matter subsequently came before an administrative law judge ("ALJ"). In a decision issued on October 12, 2006, the ALJ found that Roberts's disability was temporary total from March 11, 2002, to July 11, 2005; permanent total from July 12, 2005, to October 9, 2005; and permanent partial beginning on October 10, 2005. The ALJ calculated Roberts's average weekly wage at the time of injury to be $2,853.08 and his residual wage-earning capacity while partially disabled to be $720.00 per week. Based on these figures alone, Roberts was entitled to weekly compensation in the amount of $1,902.05 during his periods of permanent total and temporary total disability, and $1,422.05 during his period of permanent partial disability. The ALJ concluded, however, that the applicable maximum rate with respect to each of Roberts's periods of disability was $966.08 per week – 200% the national average weekly wage for fiscal year 2002, the year Roberts first became disabled. Because the compensation to which Roberts would have otherwise been entitled exceeded the applicable maximum rate, the

ALJ ordered Sea-Land and its insurer to pay Roberts $966.08 per week for all periods of disability.

Roberts filed a motion for reconsideration of the ALJ's decision. The ALJ denied the motion but determined that he had applied the wrong maximum rate to Roberts's permanent total disability during the period between October 1, 2005, and October 9, 2005. According to the ALJ, the applicable maximum rate for that period was not $966.08, but rather $1,073.64—200% of the national average weekly wage with respect to fiscal year 2006. The Benefits Review Board affirmed the ALJ's decision and his order denying reconsideration. Roberts timely petitions this court for review.

II

This case presents two questions regarding the interpretation of section 6(c) of the LHWCA. The first concerns when an employee is "newly awarded compensation." According to Roberts, the ALJ erred by holding that he was "newly awarded compensation" in fiscal year 2002, when he first became disabled. Roberts argues that he was not "newly awarded compensation" until fiscal year 2007, when the ALJ issued his decision making a formal award of compensation, and that therefore the ALJ should have used the national average weekly wage with respect to fiscal year 2007 in calculating the maximum rate that governs his compensation for temporary total and permanent partial disability. We disagree.

The Act does not expressly define the terms "award" or "awarded." *See* 33 U.S.C. § 902. In *Astrue v. Ratliff*, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010), however, the Supreme Court held that "[t]he transitive verb "'award'" has a settled meaning in the litigation context: It means '[t]o give or assign by sentence or judicial determination.'" *Id.* at 2526 (emphasis removed) (quoting *Black's Law Dictionary* 125 (5th ed. 1979)). Consistent with this meaning of the verb, some sections of the LHWCA use the noun "award" to mean a formal compensation order issued in the course of administrative adjudication. *See, e.g.*, 33 U.S.C. § 913(a); *id.* § 914(a); *id.* § 928(a).

In other sections, however, the LHWCA uses the terms "award" and "awarded" to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order. Section 8, for example, defines "awards" for specific types of injuries. *See, e.g., id.* § 908(c)(22) (defining the "award" for loss of certain body parts). Section 8(c)(20) also provides that "[p]roper and equitable compensation not to exceed $7,500 shall be *awarded* for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment." *Id.* § 908(c)(20) (emphasis added). By use of the term "awarded," Congress could not have meant "assigned by formal order in the course of adjudication," given that employers are obligated to pay such compensation regardless of whether an employee files an administrative claim. Section 908 thus uses the terms

"award" and "awarded" to refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal order of compensation

Section 10 similarly uses the term "awarded" to refer to an employee's entitlement to compensation, irrespective of a formal compensation order. Section 10(h)(1) increases the average weekly wage of an employee or survivor who "was *awarded* compensation . . . at less than the maximum rate" for permanent total disability or death occurring prior to October 27, 1972. *Id.* § 910(h)(1) (emphasis added). Given that section 10(h)(1) expressly governs "the compensation to which an employee or his survivor is *entitled* due to total permanent disability or death which commenced or occurred prior to October 27, 1972," *id.* (emphasis added), Congress apparently used "awarded compensation" and "entitled to compensation" to mean the same thing.

Section 6 uses "awarded" in the same context as sections 8 and 10. Like sections 8 and 10, section 6 governs determinations of compensation under the Act. Like sections 8 and 10, moreover, compensation governed by § 906 is due without a formal compensation order. *See id.* §§ 904(a), 914(a). Thus, "awarded" as used in section 6 does not mean "assigned by formal order in the course of adjudication." Consistent with the meaning of "awarded" in sections 8 and 10, "newly awarded compensation" in section 6 means "newly entitled to compensation."

Our interpretation of the phrase finds further support in section 33 of the Act, which states: "For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board." *Id.* § 933(b). Section 33 implicitly contemplates that the meaning of the term "award" in other sections is not limited to a formal compensation order. Unless "award" is used in other sections to mean something broader than a formal compensation order, the specific definition in section 33 would be unnecessary.

Moreover, we must read section 6 "with a view to [its] place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (internal quotation marks omitted). Our holding that an employee is "newly awarded" compensation when he first becomes disabled accords with the structure of the LHWCA, which identifies the time of injury as the appropriate marker for other calculations relating to compensation. For instance, the Act provides that the employee's average weekly wage – the starting point for determining compensation – is calculated at the time of injury. *See* 33 U.S.C. § 910. The employee's residual wage-earning capacity – used to offset the average weekly wage in cases of partial disability – is also calculated at the time of injury. *See id.* § 908(c)(21), (e); *Johnston v. Dir., Office of Workers' Comp. Programs*, 280 F.3d 1272, 1277 (9th Cir. 2002). To apply the national average weekly wage with

respect to a year other than the year the employee first becomes disabled would be to depart from the Act's pattern of basing calculations on the time of injury.

We are not persuaded by *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997), which holds that an employee is "newly awarded compensation" at the time of a formal compensation order. *Id.* at 906. The Fifth Circuit in *Wilkerson* did not engage in any analysis of the text of the LHWCA. Nor did it explain how its interpretation accords with the overall statutory scheme. Rather, that court resolved the issue summarily without expressing any reasoning. We are not bound by *Wilkerson* and find nothing in the opinion that persuades us to abandon our holding here.[1]

We therefore hold that an employee is "newly awarded compensation" within the meaning of section

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[1] We note that Roberts's proposed construction would have the potential for inequitable results: Two claimants injured on the same day could be entitled to different amounts of compensation depending on when their awards are entered. *See Rucker v. Davis*, 237 F.3d 1113, 1119 (9th Cir. 2001) (en banc) ("We will not assume that Congress intended a statute to create odd or absurd results."), *overruled on other grounds by Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002). Roberts counters that far from being illogical, such a possibility encourages employers to expedite administrative proceedings rather than delay the process. His argument is undercut by the fact that section 14 of the LHWCA already provides penalties for delay by an employer. *See* 33 U.S.C. § 914(e).

6(c) when he first becomes entitled to compensation. Because Roberts became newly entitled to compensation in fiscal year 2002, the ALJ properly applied the 2002 fiscal year maximum to Roberts's compensation for temporary total disability and permanent partial disability.

III

We next consider when an employee is "currently receiving compensation for permanent total disability" for purposes of section 6(c). According to Roberts, the ALJ erred by applying the national average weekly wage with respect to fiscal year 2002 in calculating the maximum rate of compensation for his permanent total disability between July 12, 2005, and September 30, 2005. Roberts contends that he could not have been "currently receiving compensation for permanent total disability" until fiscal year 2005 at the earliest, when he began suffering such disability.

If Roberts's employer had actually paid him compensation for permanent total disability between July 12, 2005, and September 30, 2005, then the applicable maximum rate would be obvious: Because Roberts would have been "currently receiving compensation for permanent total disability . . . during such period," the applicable maximum rate would be 200% of the determination of the national average weekly wage with respect to that period (*i.e.*, fiscal year 2005). But in fact, Roberts's employer stopped paying him compensation in May 2005, so he did not

actually receive any compensation during his period of permanent total disability. The question is whether this means a different maximum rate should apply. We do not believe it does.

Employers are obligated to pay compensation due under the Act – including compensation for permanent total disability – regardless of whether an employee files an administrative claim. *See* 33 U.S.C. §§ 904(a), 914(a). By requiring that such compensation "be paid periodically, promptly, and directly to the person entitled thereto," *id.* § 914(a), the Act expects employees entitled to compensation to receive payment during their period of disability. In view of this background expectation, we construe section 6(c)'s reference to the period "during" which an employee is "currently receiving compensation for permanent total disability" to mean the period during which an employee is *entitled* to receive such compensation, regardless of whether his employer actually pays it. By doing so, we render interpretation of section 6(c)'s "newly awarded" and "currently receiving" clauses consistent: Under both clauses, the inquiry into the applicable maximum rate focuses on an employee's *entitlement* to compensation.

In this case, Roberts was entitled to receive compensation for permanent total disability during the period between July 12, 2005, and September 30, 2005. Thus, although his employer did not actually pay him, we hold that he was "currently receiving compensation for permanent total disability . . . during such period." It follows that the applicable

maximum rate should be based on the "[d]etermination[ ] [of the national average weekly wage] with respect to [that] period" – namely, the national average weekly wage with respect to fiscal year 2005.[2]

We believe the statute is clear: The "currently receiving" clause of section 6(c) unambiguously refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually paid it. Because Roberts was entitled to receive such compensation during the period between July 12, 2005, and September 30, 2005, we hold that the ALJ erred by applying the national average weekly wage with respect to fiscal year 2002, rather than fiscal year 2005, in calculating the applicable maximum rate under section 6(c).

IV

For the foregoing reasons, we **AFFIRM** the Benefits Review Board's order with respect to Roberts's compensation for temporary total disability between March 11, 2002, and July 11, 2005; his compensation for permanent total disability between

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[2] It likewise follows that the ALJ properly concluded in denying Roberts's motion for reconsideration that the national average weekly wage with respect to fiscal year 2006 governs his maximum rate of compensation for permanent total disability from October 1, 2005, to October 9, 2005. *See* 33 U.S.C. § 906(b)(3) (directing that the national average weekly wage with respect to each new fiscal year take effect on October 1).

October 1, 2005, and October 9, 2005; and his compensation for permanent partial disability beginning on October 10, 2005. We **REVERSE** the Board's order with respect to Roberts's compensation for permanent total disability between July 12, 2005, and September 30, 2005, and **REMAND** the case for further proceedings consistent with this opinion.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

Each party shall bear its own costs.

U.S. Department of Labor [SEAL]

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 07-0382
and 07-0382A

D.R. Claimant-Petitioner Cross-Respondent v. SEA-LAND SERVICES, INCORPORATED (a.k.a., CSX LINES) and KEMPER INSURANCE COMPANIES Employer/Carrier-Respondents Cross-Petitioners	)	DATE ISSUED: NOV 30 2007 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Michael F. Pozzi, Renton, Washington, for claimant.

Frank B. Hugg (Law Offices of Frank B. Hugg), Oakland, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration (2005-LHC-2193) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was involved in a slip and fall accident while working for employer as a gatehouse dispatcher at its Dutch Harbor, Alaska, terminal on February 24, 2002. As a result, he was diagnosed with a first-degree right shoulder separation and a cervical disc herniation at the C5-6 level. Both conditions eventually required surgery and resulted in the imposition of medically sanctioned light-duty work restrictions from February 24, 2002. Claimant, not having worked since his February 24, 2002, accident, filed a claim seeking benefits under the Act. Employer

controverted arguing, in part, that claimant was excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A), because his work as a gatehouse dispatcher was exclusively clerical in nature.

In his decision, the administrative law judge determined that claimant was not excluded from the Act's coverage as a clerical employee under Section 2(3)(A) of the Act, as claimant's duties as a gatehouse dispatcher involved the exercise of judgment and expertise beyond that exhibited by clerical workers and involved work outside the physical confines of his office, *i.e.*, the gatehouse. The administrative law judge found claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the connection between his cervical and right shoulder conditions and his employment and that employer rebutted the presumption. Based on the record as a whole, the administrative law judge found that claimant's cervical and right shoulder conditions are related to the February 24, 2002, work incident. The administrative law judge further found that claimant could not return to his usual employment and that employer did not establish the availability of suitable alternate employment until October 10, 2005. He thus awarded claimant temporary total disability benefits from March 11, 2002, to July 11, 2005, permanent total disability benefits from July

12, 2005,[1] through October 9, 2005, and permanent partial disability benefits thereafter based on the maximum compensation rate of Section 6(b), 33 U.S.C. §906(b).

Claimant sought reconsideration, arguing that the administrative law judge misapplied the maximum compensation rate of Section 6(b). The administrative law judge rejected claimant's argument, citing the Board's decision in *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006). He nevertheless corrected claimant's award of benefits to reflect a calculation error made by the district director and referred the case to the district director for a determination as to claimant's entitlement to an additional assessment on unpaid compensation pursuant to Section 14(f), 33 U.S.C. §914(f).

On appeal, claimant challenges the administrative law judge's decision to limit claimant's disability compensation to the maximum rate, pursuant to Section 6(c) of the Act, 33 U.S.C. §906(c), in effect at the time of his injury.[2] In its cross-appeal, employer

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[1] The administrative law judge found, based on Dr. Wickler's opinion, that claimant reached maximum medical improvement for his conditions as of July 12, 2005.

[2] Section 6(b) provides for a maximum compensation rate of 200 percent of the national average weekly wage, which is determined each October 1 pursuant to subsection (b)(3). Section 6(c) provides

> (c) Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total

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asserts that the administrative law judge erred in finding Section 2(3)(A) inapplicable, and thus, in finding that claimant established that he is covered under the Act. Claimant responds, urging affirmance.

Claimant argues that the administrative law judge erred in establishing a compensation rate for his temporary total, permanent total, and permanent partial disability benefits by reference to the maximum rate in effect as of the date of injury, *i.e.*, February 24, 2002. Claimant acknowledges that the administrative law judge's award and denial of reconsideration are in accordance with the Board's decision in *Reposky*, 40 BRBS 65, but submits that the Board's decision therein was in error.

In his initial decision, the administrative law judge found that the compensation rate for claimant's temporary total, permanent total, and permanent partial disability benefits is $966.08, "the maximum rate for injuries occurring between October 1, 2001, and September, 30, 2002." Decision and Order at 32-33. The administrative law judge added that, with regard to claimant's award of permanent total disability benefits for the period between July 12, 2005, and October 9, 2005, claimant is entitled to "any increases required under Section 6 of the [Act]." *Id.*

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disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(c).

On reconsideration, the administrative law judge denied claimant's motion based on the Board's holding in *Reposky*, 40 BRBS 65, that "a claimant receiving temporary total disability compensation remains at the maximum rate in effect when benefits commence because, on the following October 1, he would not be receiving benefits for permanent total disability or death and is therefore not entitled to the new maximum rate." *Reposky*, 40 BRBS at 76; *see also Puccetti v. Ceres Gulf*, 24 BRBS 25, 32 (1990). The administrative law judge, however, agreed with the parties that the district director incorrectly calculated the compensation rate for the period of permanent total disability benefits between October 1, 2005, and October 9, 2005. Specifically, the administrative law judge found, pursuant to *Reposky*, 40 BRBS at 79, that claimant's entitlement to permanent total disability benefits must reflect the increase in the maximum compensation rate as of October 1, 2005, to $1,073.64, thereby resulting in his entitlement to additional permanent total disability benefits for the period of October 1 through October 9, 2005.

As claimant concedes, "the administrative law judge's award and denial of reconsideration in this case are in accordance with the Board's decision in *Reposky*." Claimant's Brief in Support of P/R at 4. In *Reposky*, the Board initially rejected the claimant's contention that the statutory maximum rate as of the date the administrative law judge issued her decision in July 2005 should apply to all periods of temporary total disability, including those predating the decision.

Reposky, 40 BRBS at 76. Rather, the Board held, citing its prior decisions in *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), and *Puccetti*, 24 BRBS 25, that the pertinent maximum rate is determined by the date the disability commences, as this interpretation of the language of Section 6(c) "maintains consistency in the statute and yields rational results." *Reposky*, 40 BRBS at 76. The Board also held that under the plain language of Section 6(c), claimant is not entitled to a new maximum rate each fiscal year because she was neither currently receiving compensation for permanent total disability nor newly awarded compensation for those periods. *Reposky*, 40 BRBS at 76-77. Lastly, the Board held that in cases where claimant's temporary total disability changes to permanent total disability, the compensation rate for permanent total disability remains the same at the date of maximum medical improvement as the rate in effect for the preceding period of temporary total disability, but that claimant is entitled to the new statutory maximum in effect on October 1 following the date of maximum medical improvement. *Reposky*, 40 BRBS at 77. As the administrative law judge's decisions accord with *Reposky*, 40 BRBS 65, we affirm the administrative law judge's application of the maximum compensation rates.

In its appeal, employer argues that the administrative law judge improperly applied the clerical exclusion by ignoring the congressional intent of the 1984 Amendments to exclude office workers who essentially perform only paper work and administrative

tasks. Employer asserts that, as discussed in *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003), claimant's general confinement, from both a physical and functional standpoint, to the administrative areas of its operations, warrants application of the clerical exclusion under Section 2(3)(A).

Under Section 2(3) of the Act, a covered employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U.S.C. 902(3). In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. The pertinent provision in this case, Section 2(3)(A), provides for the exclusion of "[i]ndividuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work*," if such persons are covered by State workers' compensation laws. 33 U.S.C. §902(3)(A) (emphasis added). The legislative history explains that the excluded activities and occupations either lack a substantial nexus to maritime navigation and commerce or do not expose those employees to the hazards normally associated with longshoring, shipbuilding and harbor work. H.R. Rep. No. 570, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2735. In this regard, the Board has observed that the legislative history regarding Section 2(3)(A) indicates that the term "office" modifies the term "clerical" such that "only clerical work performed exclusively in a business

office is intended to be excluded." *Boone*, 37 BRBS at 3. In other words, the legislative history of Section 2(3)(A) reveals the intent to exclude employees who are "confined physically and by function to the administrative areas of the employer's operations." *Id., citing* 1984 U.S.C.C.A.N. 2734, 2737.

The Board's prior decisions illustrate that the applicability of the Section 2(3)(A) clerical exception hinges on two key elements regarding the work performed: 1) whether the work is performed "exclusively" in an office setting; and 2) whether the work requires the exercise of judgment and expertise that goes beyond that typical of clerical work. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005); *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006); *Boone*, 37 BRBS 1; *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Jannuzzelli v. Maersk Container Serv. Co.*, 25 BRBS 66 (1991) (Clarke, J., dissenting).

Applying these principles to the instant case, we hold that substantial evidence supports the administrative law judge's finding that claimant's employment duties as a gatehouse dispatcher do not involve exclusively office clerical work. The administrative law judge found that claimant's work required the exercise of judgment and expertise beyond that of a typical clerical worker. *Wheeler*, 39 BRBS 49,

Morganti, 37 BRBS 126. As the administrative law judge found, claimant's testimony establishes that he was required to perform a variety of tasks, both within an "office" and throughout the terminal as needed. HT at 198-199. Claimant testified that he was required to work with the yard foreman to determine which containers were to be used and where they were to be stored. HT at 85; *see also Wheeler*, 39 BRBS 49, *Morganti*, 37 BRBS 126. More specifically, claimant stated that he advised the yard foremen regarding the priority given to outbound containers and told them which vessel hatches needed to be unloaded first to ensure prompt delivery of incoming containers. HT at 86-92. Claimant also stated that he was, on occasion, responsible for determining the types, and ensuring the availability of, containers needed for transshipping cargo to other ports and finding yard space for the efficient storage of the containers. *Id.* Thus, claimant's duties as a gatehouse dispatcher did not involve exclusively office clerical work. *Wheeler*, 39 BRBS 49, *Morganti*, 37 BRBS 126.

Moreover, substantial evidence supports the administrative law judge's finding that claimant's duties required him to perform work beyond the confines of his "office," *i.e.*, the gatehouse. Claimant testified that he would occasionally have to physically inspect containers to discern whether they were in a suitable condition or properly loaded,[3] and that he

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[3] Claimant explained that in inspecting containers, it would be necessary, from time to time, for him to break the seal on the

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would, at other times, have to go to the freight yard to locate containers or provide additional assistance to drivers.[4] HT at 94-95, 210-213. As the administrative law judge noted, claimant's testimony regarding his "out-of-office activities" is corroborated, in part, by the testimony of a longshoreman, Dan Kondak, who stated that he would generally see claimant working at the gatehouse, but that "it wouldn't be uncommon to see him anywhere," HT at 229, as well as that of Mr. Lynch, who was the manager of the CSX Lines terminal at Dutch Harbor, which indicates that employer expects gatehouse dispatchers to do whatever needs to be done to serve the customers. HT at 257-58; *see also Boone*, 37 BRBS 1; *Jannuzzelli*, 25 BRBS 66.

As the administrative law judge's finding that the work which claimant performed as a gatehouse dispatcher was not exclusively office clerical work is

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container, attach a new seal, and inform others that the seal had been changed. HT at 95-96.

[4] Claimant stated that his job responsibilities made it necessary for him to leave the gatehouse to go to the freight yard to locate recently off-loaded containers, HT at 97-98, to determine which containers might be fully loaded and ready for pickup, HT at 195-196, or to accompany customers to the freight yard to determine the contents of a particular container. HT at 98. Claimant would also leave the gatehouse to assist a driver or customer deal with problems, such as when he would "hold the door" so that a driver could back a container up to a loading dock, HT at 99, 176, or go to the dock to aid a driver in dealing with broken pallets which might be slowing down an unloading process. HT at 99-100.

supported by substantial evidence, his conclusion that the clerical exception to coverage under Section 2(3)(A) is inapplicable is affirmed. *Wheeler*, 39 BRBS 49; *Morganti*, 37 BRBS 126; *Boone*, 37 BRBS at 1.

Employer also argues that the administrative law judge erred in finding that claimant established he is a maritime employee under the Act, asserting that as a gatehouse dispatcher his exposure to the "perils and hazards of the unloading process" was inconsequential and negligible. Claimant urges the Board to reject employer's contention regarding his status as a maritime employee as it was not raised before the administrative law judge in this case. We agree.

At the hearing, employer's counsel stated that it was raising the applicability of the Section 2(3)(A) exclusion in this case, that it did not dispute that the location of the injury, within its terminal premises, satisfied the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a), and that there were no "other coverage or jurisdictional issues." HT 25-37. Employer's post-hearing brief similarly indicates that its arguments on coverage were limited to the applicability of the Section 2(3)(A) exclusion. In this regard, employer stated "[a]dmittedly, claimant was working in a position that was an integral part of the longshoring operation in Dutch Harbor." Employer's Post-Hearing Brief at 17. Accordingly, the administrative law judge found that situs was stipulated, that "the [employer and its carrier] concede that the claimant had status as a maritime worker under the

provisions of subsection 2(3) at the time of his work injury," and that employer's argument regarding coverage was limited to whether claimant's work as a gatehouse dispatcher was "within the scope of the subsection 2(3)(A) exclusion." Decision and Order at 15, 17.

The Board previously has declined to address factual issues when those arguments were not raised before the administrative law judge. Because employer failed to first raise the general status issue before the administrative law judge, and instead essentially conceded that claimant established, by virtue of his employment as a gatehouse dispatcher, both the status and situs elements of coverage, we decline to address it on appeal. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). The administrative law judge's determinations that the clerical exclusion at Section 2(3)(A) is inapplicable, and thus, that claimant is entitled to coverage under the Act, are affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

U.S. Department of Labor [SEAL]

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Issue Date: 14 December 2006

CASE NUMBER: 2005-LHC-02193

OWCP NUMBER: 14-137417

In the Matter of:

D. R.,

Claimant,

v.

SEA-LAND SERVICES, INC, a.k.a. CSX LINES,

Employer,

and

KEMPER INSURANCE COMPANIES,

Insurer.

ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION

On October 25, 2006, the claimant filed a timely motion seeking reconsideration of the Decision and Order Awarding Benefits that was served by the District Director on October 18, 2006. In brief, the motion contended that the compensation rates set forth in the Decision and Order were lower than those required under section 6 of the Longshore Act

and should therefore be increased. However, on November 8, 2006, the claimant submitted a Supplemental Memorandum in which he reported that the Benefits Review Board recently issued a decision in *Reposky v. International Transportation Services* (October 20, 2006) that in effect requires the denial of his Motion for Reconsideration.

Nonetheless, in that same Supplemental Memorandum the claimant went on to indicate that even though the Decision and Order Awarding Benefits had required the employer to pay permanent total disability benefits from July 12, 2005 until October 9, 2005 "at a compensation rate of $966.08 per week, plus any increases required under section 6 of the Longshore Act," the District Director's calculation of the amounts due under the award had failed to include the full increase in benefits that was due under the provisions of section 6 for the period between October 1, 2005 and October 9, 2005. Thus, the claimant asserted, the District Director's erroneous calculation of the amount of compensation owed for that period had caused the employer to pay $106.25 less than was actually owed in permanent total disability benefits. In addition, the Supplemental Memorandum contended that the employer's failure to pay the full amount actually owed within 10 days after service of the Decision and Order Awarding Benefits made it liable under the provisions of subsection 14(f) of the Act for a 20 percent late payment penalty of $21.25.

In a response filed on November 16, 2006, the employer concurred with the claimant's acknowledgement that the *Reposky* decision requires denial of all the requests for relief in the Motion for Reconsideration, except insofar as the motion might pertain to the amount of compensation owed for the period between October 1, 2005 and October 9, 2005. In that regard, the employer acknowledged that the *Reposky* decision confirms that the claimant was entitled to receive benefits at the maximum rate during that period and that the District Director had therefore incorrectly calculated the amount owed. However, the employer contended that it is not liable for the payment of any subsection 14(f) penalty.

On November 25, 2006, the claimant submitted a reply which pointed out that there is no disagreement between the parties concerning the meaning of the Decision and Order Awarding Benefits and that the only remaining dispute concerns the employer's alleged liability for the payment of a subsection 14(f) penalty. That dispute, the claimant contended, cannot properly be resolved in a ruling on a motion for reconsideration and must instead be resolved in a proceeding under subsection 18(a) of the Act. In that regard, the claimant represented that he will not initiate such a proceeding if the employer will now pay him the $106.25 in unpaid compensation, plus a 20 percent penalty, and interest. The reply also suggested that it would be helpful if the initial Decision and Order Awarding Benefits could be clarified to confirm that it does in fact award compensation to

the claimant at the maximum rate of $1,073.64 per week for the period between October 1, 2005 and October 9, 2005.

ANALYSIS

Insofar as the Decision and Order Awarding Benefits ordered the payment of permanent total disability benefits for the period between October 1, 2005 and October 9, 2005, it was intended that the benefits be paid at the maximum compensation rate in effect during that period: $1,073.64. Although it [sic] not known why the District Director determined that a different amount was owed, it is clear from the BRB's *Reposky* decision and even earlier decisions that the proper compensation rate for the claimant during the first nine days of October of 2005 was in fact $1,073.64. Whether the employer should be penalized under subsection 14(f) for failure to pay benefits at that rate is a question that must be addressed to the District Director under the provisions of section 18 of the Act, and it therefore cannot be addressed in this proceeding.

ORDER

In view of the BRB's recent decision in *Reposky v. International Transportation Services*, the claimant's request for reconsideration of the Decision and Order

Awarding Benefits that was served by the District Director on October 18, 2006 is hereby denied.

[Signature Omitted]
Paul A. Mapes
Administrative Law Judge

San Francisco, California

U.S. Department of Labor [SEAL]

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Issue Date: 12 October 2006

CASE NUMBER: 2005-LHC-02193

OWCP NUMBER: 14-137417

In the Matter of:

D. R.,

Claimant,

v.

SEA-LAND SERVICES, INC, a.k.a. CSX LINES,

Employer,

and

KEMPER INSURANCE COMPANIES,

Insurer.

Appearances:

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Attorney at Law	Holmes, Weddle & Barcott
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Renton, Washington 98055	Anchorage, Alaska 99501
For the Claimant	For the Defendants

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (the "Act" or the "Longshore Act"). The claimant seeks Longshore Act benefits for an injury that occurred while he was working for CSX Lines ("the employer" or "CSX Lines") on February 24, 2002. A trial on the merits of the claim was held on January 11 and 12, 2006 in Seattle, Washington. All parties were represented by counsel and the following exhibits were admitted into evidence: Claimant Exhibits ("CX") 1-30 and Employer Exhibits ("EX") 1-22, and 24-41. All parties filed post-trial briefs.

BACKGROUND

The claimant was born on May 28, 1953. Tr. at 70. He has a high school equivalency degree and has completed various college courses. EX 1 at 40, EX 15 at 51, Tr. at 71, 325, 368. In 1984, he moved to Dutch Harbor, Alaska, and in 1988 he began working as a longshoreman. Tr. at 72-74, EX 1 at 40-43. In 1994, the claimant was hired to be a "gatehouse dispatcher" at a marine terminal operated by Sea-Land Services, the corporate predecessor of CSX Lines.[1] EX 39 at 583, Tr. at 83. According to the claimant's testimony, the hours he worked as a gatehouse dispatcher varied

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[1] Sometime after February of 2002, the operation of CSX Lines' marine terminal in Dutch Harbor was taken over by Horizon Lines. Tr. at 83, 249.

and when things would "slow down" he would get other kinds of longshore jobs from his union's hiring hall. Tr. at 101-02, EX 15 at 25. However, during busy periods, he would sometimes work as a gatehouse dispatcher for as many as 80 to 100 hours a week. Tr. at 101-02. The claimant also routinely took off 12 to 13 weeks each year, as permitted by the employer. Tr. at 103.

Around September 2001, the claimant developed right shoulder pain after pruning trees on farm property that he owns in Maine. Tr. at 106-07. After the pain had continued for about a month, the claimant sought medical attention from Laurence Wickler, D.O., who practices orthopedic surgery in Anchorage. Tr. at 106-07, CX 4. On September 27, 2001, Dr. Wickler examined the claimant and determined that there were signs of an anterior impingement and a possible rotator cuff tear. EX 18. Dr. Wickler also noted that x-rays showed calcification in the claimant's coracoacromial ligament. EX 18 at 341.

On October 5, 2001, the claimant underwent an MRI of his right shoulder that was interpreted by Dr. Lawrence P. Wood as showing a focal tear in the claimant's supraspinatus tendon and "[m]oderately severe acromioclavicular osteoarthritis with hypertrophic changes" that put the claimant at "a high risk for impingement." CX 3 at 27. After receiving Dr. Woods' report, Dr. Wickler recommended surgical treatment and explained to the claimant that after he recovered from the surgery, he should have a "functional range of motion" in his shoulder but would not

achieve a complete return of motion. EX 19 at 353-54. As recommended by Dr. Wickler, the claimant underwent arthroscopic surgery on October 31, 2001. CX 3 at 29-33. During the surgery, Dr. Wickler repaired the claimant's rotator cuff and a superior labral anterior posterior ("SLAP") lesion. Tr. at 108-09, CX 3 at 29-33.

On November 14, 2001, Dr. Wickler's measurements of the claimant's right shoulder showed passive elevation of 45 degrees, external rotation of 15 degrees, and internal rotation of 10 degrees. EX 18 at 343. Likewise, measurements taken on December 4, 2001 showed passive elevation of 45 to 50 degrees, external rotation of 10 to 15 degrees, and internal rotation of 15 degrees. EX 18 at 343. Given these measurements, on December 18, 2001, Dr. Wickler observed that the claimant's "[i]nternal and external rotation are still quite stiff," and that he "still lacks about 5-10 degrees of elevation." EX 18 at 343. The claimant visited Dr. Wickler again on January 16, 2002 and February 5, 2002. CX 3 at 10. During the February 5 visit, Dr. Wickler released the claimant to return to "full duty" and noted that his right shoulder had achieved a passive elevation of 60 degrees, an external rotation of 15 to 20 degrees, and an internal rotation of 30 degrees. CX 3 at 10.

On February 7, 2002, the claimant returned to Dutch Harbor and resumed his job as a gatehouse dispatcher. Tr. at 109.

During the course of the claimant's work as a gatehouse dispatcher on February 24, 2002, he left

the gatehouse to move a vehicle from the gatehouse parking lot and slipped on a patch of ice as he stepped from a walkway into the parking lot. Tr. at 109-10, EX 15 at 69. According to the claimant, he then fell "fast" and "very hard" onto the right side of his body. Tr. at 110-11. The claimant further testified that when he hit the ground, he heard a "loud snapping sound" and that when he got up his hip and right shoulder were sore. Tr. at 110-12. Later that same day, the claimant filed an injury report in which he identified his right hand, right hip, and right shoulder as the "body parts affected" by his fall in the parking lot. CX 19 at 206, Tr. at 112-13, 160-63. He did not, however, indicate on the form that he had any neck pain or injury to his neck. CX 19 at 206. The claimant then completed the rest of his shift and worked a full shift on the following day. Tr. at 112. On the third day, however, the claimant concluded that his symptoms were increasing and he therefore sought medical treatment at Illiliuk Family and Health Services in Unalaska, Alaska. EX 31 at 566, Tr. at 112-13, 163, 174.

At the clinic, Dr. Gary Berliner took x-rays of the claimant's right shoulder and diagnosed a first-degree right shoulder acromioclavicular joint separation with a first-degree acromioclavicular ligament sprain and chip evulsion. Tr. at 113-14, 163-64; EX 30 at 507, 525, 527-28; EX 31 at 568. Dr. Berliner also referred the claimant to Dr. Wickler for further treatment and provided him with analgesics and a clavicle strap (velpeau sling) that he used to immobilize his arm in

the following weeks. EX 16 at exhibit 3, Tr. at 113, 163-64.

Because of harsh weather conditions and administrative difficulties in obtaining authorization for travel to Anchorage, the claimant was unable to see Dr. Wickler until March 12, 2002. EX 18 at 346, Tr. at 114-15, CX 3 at 10, 16. In the meantime, the claimant worked 32 hours of straight time and 80.5 hours of overtime during the first week after the incident, 40 hours of straight time and 52.5 hours of overtime in the second week, and 40 hours of straight time and 46 hours of overtime during the third week. EX 10 at 251, Tr. at 172-74.

During Dr. Wickler's March 12 examination of the claimant, he observed that there was a loss of motion and strength in the claimant's right shoulder and that the claimant "shrugs as he tries to elevate." CX 3 at 10. Dr. Wickler suspected that the claimant re-injured his shoulder and therefore requested that the claimant undergo an MRI. CX 3 at 10, Tr. at 115. Dr. Wickler's report of the March 12 examination does not contain any reference to any complaints of neck or arm pain. CX 3 at 10.

The MRI requested by Dr. Wicker was interpreted by Dr. Wood as showing "[p]ostsurgical changes to the supraspinatus tendon with no obvious tear but intermittent signal intensity at its insertion site is consistent with scarring or chronic tendinopathy." CX 3 at 25. In addition, Dr. Wood noted that there was "[f]luid within the subacromial subdeltoid bursa" but

"[n]o definite labral or capsular" abnormalities. CX 6 at 64. Dr. Wood also commented that the claimant's "[m]oderately severe acromioclavicular osteoarthritis" was unchanged. CX 3 at 25.

On March 21, 2002, Dr. Wickler reviewed the results of the MRI and determined that there had not been a "retear" in the claimant's rotator cuff repair. CX 3 at 10. However, he observed that the claimant's continued "pain over the anterior portion of his shoulder . . . [and] the upper part of his shoulder" was "consistent with a first degree sprain of the AC joint," which he attributed to the claimant's fall. CX 3 at 10. Dr. Wickler also reported that the claimant had complaints of "mid and upper thoracic pain" which he added was "probably also directly related to his fall." CX 3 at 10. In addition, Dr. Wickler concluded that the claimant was not ready to return to full-duty work and referred him to Dr. Steve Henderson, a chiropractor and physical therapist, for treatment of the thoracic and upper thoracic symptoms. CX 3 at 10. Dr. Wickler noted, however, that he would release the claimant for light duty work, if the employer was willing to employ him in a light duty position. CX 3 at 10, EX 18 at 346. Dr. Wickler also decided that the claimant should continue to receive physical therapy from Alaska Health Quest. CX 3 at 10, Tr. at 115-17.

The claimant was immediately seen by Dr. Henderson, who noted in a report dated March 21, 2002 that the claimant said that he had constant pain at level six on a ten point scale "in the left region of [his] neck and stiffness in [his] neck which is

increased by bending the neck right." CX 10 at 129. In addition, Dr. Henderson reported that the claimant complained of level-five pain in his right shoulder and that he had broken a tooth when he fell. CX 10 at 129. Although the report indicates that the claimant's lumbosacral and cervical ranges of motion were all normal, it also indicates that a test for "cervical nerve root compression" was positive bilaterally. CX 10 at 130.

On April 19, 2002, Dr. Wickler reported that the claimant was still experiencing "pain over the AC joint and the coracoclavicular ligaments" and was not ready to return to full duty. CX 3 at 9, EX 30 at 544. Additionally, he noted that Dr. Henderson was attending to the claimant's "upper back" and that the claimant had undergone dental work "secondary to his fall." CX 3 at 9, EX 30 at 544.

On April 22, 2002, Dr. Henderson re-examined the claimant and found a "mild to moderate level of discomfort" upon palpitating the claimant's neck tissues at levels C1, C2, and C5. EX 30 at 545. On that same, date Dr. Henderson reported that there had been no change in the claimant's neck pain and that his measurements of the range of motion in the claimant's neck produced less than normal results for all ranges except flexion. EX 30 at 547.

On May 17, 2002, Dr. Wickler found that the claimant's shoulder condition was improving and reported that the claimant had right shoulder elevation of 90 degrees, external rotation of 45 to 60 degrees,

and internal rotation of 30 degrees. CX 3 at 9. He also noted that the claimant would continue to receive physical therapy twice a week and opined that the claimant was not yet able to return to work. CX 3 at 9.

On June 18, Dr. Wickler re-examined the claimant and observed that although he continued to complain of pain in his AC joint and neck, his shoulder motion was "excellent." CX 3 at 9. However, Dr. Wickler further noted that the claimant said that "[r]apid motion" and "jerking" were highly uncomfortable and that even trying to hit a tennis ball two or three times was unpleasant. CX 3 at 9. Dr. Wickler opined that the claimant was still not ready for full-duty work. CX 3 at 9.

On July 1, 2002, Dr. Henderson reported to Dr. Wickler that the claimant had a restricted range of motion in his cervical spine and opined that he was "still not medically stable to return to work." EX 24 at 485. Dr. Henderson also recommended that the claimant continue with chiropractic therapy for another six weeks." EX 24 at 485.

On July 30, 2002, Dr. Wickler observed that the claimant had "a mildly provocative test for SLAP lesion" and opined that the claimant's "options are to continue to live with it as is" or "arthroscopically remove the end of his clavicle" and re-address the SLAP lesion, if it was re-injured when the claimant fell. CX 3 at 9. However, he added, the surgery "may or may not bring him to the point of returning to his previous level of activity." CX 3 at 9. Dr. Wickler

further noted that he believed that the claimant's SLAP lesion and rotator cuff had healed, and that the majority of his symptoms were directly related to the AC joint. CX 3 at 9. In addition, Dr. Wickler wrote:

> At his previous exam prior to his surgery, he had absolutely no symptoms in his AC joint. Since the fall, the AC joint symptoms have increased, and I think it is directly related to his injury. Even though he had some pre-existing degenerative changes, I don't believe he would have come to treatment were it not for this most recent fall.[2]

CX 3 at 9.

On August 5, 2002, the claimant was examined by Dr. Holm W. Neumann, an orthopedic surgeon, at the request of the insurer's third party claims administer, Gallagher Bassett Services (Gallagher Bassett). CX 27 at 272-79. According to Dr. Neumann's report, the claimant indicated that his chief complaints at that time were right hip pain, neck pain, and right shoulder pain. CX 27 at 272. During his physical examination of the claimant, Dr. Neumann took

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[2] The record does not contain any notes from any examination that Dr. Wickler may have conducted immediately prior to his October 31, 2001 surgery on the claimant's shoulder. However, Dr. Wickler's chart note of September 27, 2001, indicates that the physical examination he conducted on that date showed that the claimant had "moderate AC joint tenderness" and "pain at the AC joint." EX 18 at 341. It is apparently these symptoms that Dr. Wickler was referring to when he wrote that "[s]ince the fall, the AC joint symptoms have increased."

detailed measurements of the ranges of motion in the claimant's shoulders and cervical spine. CX 27 at 276-77. Based on the results of his examination, Dr. Neumann concluded that the claimant suffered from "[t]rochanteric bursitis [at the] right hip, superimposed upon an apparent spurring or some type of anomaly" and that the "bursitis and current need for treatment is basically secondary to his contusion from the fall of February 24, 2002." CX 27 at 277. In addition, Dr. Neumann noted that the claimant had "[p]re-existing osteoarthritis in the acromioclavicular joint" of his right shoulder and degenerative disc and joint disease in his cervical spine, which Dr. Neumann characterized as "pre-existing his incident of February 24, 2002." CX 27 at 277-78. However, despite the fact that the claimant's rotator cuff tear and SLAP lesion had been diagnosed and repaired well before February of 2003, Dr. Neumann also opined that the claimant's rotator cuff tear and SLAP lesion were "secondary" to his work injury. CX 27 at 277-78. In addition, he concluded that the claimant had not reached maximum medical improvement and was unable to return to work as a longshoreman because he continued to experience "significant symptomatology in the right shoulder." CX 27 at 278. Dr. Neumann added that another month of conservative management would be appropriate for treating the claimant's shoulder symptoms and opined that if he showed "significant improvement," his injury could be declared to be permanent and stationary. Otherwise, he noted, consideration should be given to "surgical management." CX 27 at 278.

On August 14, 2002, the claimant sent a letter to a chiropractor in Maine, in which he informed the chiropractor that he would soon be visiting Maine and wished to schedule some chiropractic adjustments. EX 21 at 427-29. In the letter, the claimant also indicated that his major problem continued to be a separated AC ligament in his right shoulder that caused pain when he performed light chores and normal daily activities. EX 21 at 427. As well, the claimant wrote, he was "still experiencing considerable pain in the upper neck area on both sides during rotation, especially if my head is tilted up during rotation." EX 21 at 428 (emphasis omitted).

On September 9, 2002, Dr. Wickler found that the claimant was having less pain in his AC joint, but that he still experienced "pain over the anterior lateral aspect of the acromion right at the insertion of the supraspinatus." CX 3 at 8. Accordingly, Dr. Wickler requested that the claimant continue with physical therapy and did not release the claimant to return to full-duty work. CX 3 at 8.

On October 8, 2002, Dr. Wickler found the claimant "coming along" to the point that he could return to light duty work, but noted that returning to work on such a basis was "not an option" because the claimant would still need to receive physical therapy that was unavailable in Dutch Harbor. CX 3 at 8. Dr. Wickler also indicated that the claimant was still having difficulty with his neck. CX 3 at 8.

On October 14, 2002, the claimant again saw Dr. Henderson, who concluded that he should undergo additional imaging studies of his cervical spine. EX 21 at 433. As a result, later that same day the claimant underwent an MRI scan of his cervical spine at the Providence Imaging Center in Anchorage. The results of that scan were interpreted by Dr. Chakri Inampudi as revealing "a focal disc extrusion at C5-C6 level centrally and eccentrically to the left" that was causing "significant left lateral recess and left-sided neuroforaminal narrowing" but without having a "mass effect" on the claimant's spinal cord. CX 7 at 69. Dr. Inampudi's report also indicates that he observed a "focal disc protrusion centrally and slightly more eccentrically to the right" at level C6-C7, but did not see any evidence of spinal cord compression. CX 7 at 69. Finally, Dr. Inampudi noted that there was also a focal disc protrusion at the T1-T2 level, which he described as being located "centrally and eccentrically to the right," that caused "mild right lateral recess narrowing" but no "neuroforaminal narrowing." CX 7 at 69.

At the request of Dr. Henderson, on December 10, 2002 the claimant was examined by Dr. Louis Kralick, a board-certified neurosurgeon. CX 6 at 60-63, Tr. at 120. In his report, Dr. Kralick indicated that he had examined the imaging studies of the claimant's cervical spine and that he believed they showed a "disc herniation and canal and root compression at the C5-6 level." CX 6 at 61. Dr. Kralick therefore

recommended that the claimant undergo a discectomy and fusion at level C5-6.

Two days later, the claimant was re-examined by Dr. Wickler, who reported that the claimant was still having shoulder problems and speculated that the claimant's failure to achieve greater improvement in his shoulder might be due to the cervical disc herniations. CX 3 at 8. Accordingly, Dr. Wickler concluded that it would be best to postpone further treatments of the claimant's shoulder until after the claimant had undergone the neck surgery recommended by Dr. Kralick. CX 3 at 8.

On December 18, 2003, the claimant sent a letter to Gallagher Bassett in which he represented that Dr. Kralick, Dr. Wickler, and Dr. Henderson all "agree the injury to [his] neck was a result of the accident on February 24" and that all three of them recommended surgery to correct damage to the lower part of his neck. EX 21 at 432-34. The letter also asserted that Dr. Kralick, Dr. Wickler, and Dr. Henderson all believed that there was a relationship between the neck and shoulder injuries and that the healing progress for his right shoulder had probably been limited by the neurological problems in his neck. EX 21 at 434.

On January 21, 2003, the defendants responded to the claimant's letter by issuing a Notice of Controversion which admitted liability for an injury to the claimant's shoulder, but disputed all liability for any injury to the claimant's cervical, thoracic or lumbar spines. CX 20 at 207.

On the same day that the defendants issued the Notice of Controversion, Dr. Kralick re-examined the claimant and reported that flexion and rotation of the claimant's neck was "severely limited." CX 6 at 58. Dr. Kralick also opined that there was unlikely to be much improvement in the claimant's neck with "conservative management." CX 6 at 58.

On February 14, 2003, Dr. Henderson sent the Department of Labor a letter concerning the claimant's cervical condition. In the letter he wrote:

> It is my personal opinion that [the claimant's] injury has directly caused trauma to his shoulder as well as his cervical spine. He never complained of neck problems prior to the accident of February 2001. We discovered through MRI of the C-spine that he has direct trauma to the neck. This would explain his long-term problems with stiffness, decreased range of motion to the cervical spine and now, radiculopathy into the right upper extremity. It is not uncommon to see injury of this nature from this type of fall. We know that there was trauma to the head and neck, if there was enough force to cause a broken tooth to occur. This type of injury is similar to whiplash of the cervical spine, causing trauma to the intervertebral disk.

CX 10 at 92. Dr. Henderson concluded by reiterating, "Again it is my professional opinion that this injury to his disks are related to the fall. CX 10 at 92.

Similarly, on March 10, 2003, Dr. Kralick wrote, "In my opinion [the claimant's] neck and shoulder conditions were related to an accident that occurred on or about February 24, 2002. This, in my opinion, resulted in symptomatic disc herniation with neck and continued arm pain complaints." CX 6 at 57.

On March 11, 2003, Dr. Wickler re-examined the claimant and observed that although the claimant continued to experience pain in his shoulder, his shoulder range of motion was "actually quite good." CX 3 at 7. However, Dr. Wickler also opined that the claimant "has a central disc [herniation] which may also be affecting strength to the right upper extremity." CX 3 at 7.

On that same day, Dr. Wickler dictated a letter to Gallagher Bassett concerning the claimant's condition and, according to a notice stamped on the letter, it was sent to Gallagher Bassett without first being proofread by Dr. Wickler. EX 21 at 453. In the letter, Dr. Wickler noted that the claimant had a "surgical lesion of his cervical spine" and commented that given the claimant's history, "one would have to assume cause and effect from his fall on or about 2/24/02." EX 21 at 453. On March 19, 2003, the claimant called Dr. Wickler's office and left a message indicating that the letter erroneously said that he had "no significant" shoulder pain in the week after his work injury and asked that the statement be corrected. EX 21 at 455. Thereafter, Dr. Wickler proofread the letter and made the correction requested by the claimant. EX 21 at 453, 454.

On April 4, 2003, the claimant sought a second opinion concerning the treatment of his cervical condition from Dr. Frederick T. Waller, a board-certified neurosurgeon located in Portland, Oregon. CX 29 at 281-83, Tr. at 121, 123. In his report, Dr. Waller observed that x-rays and a cervical MRI revealed degenerative disc changes "at C5-6 and C5-7 with evidence of bilateral foraminal narrowing at C5-6" and noted that the claimant had reported "tingling paresthesia and numbness" in his right arm that occasionally also appeared in his left arm. CX 29 at 281-82. Dr. Waller opined that if the claimant developed left C6 radiculopathy, a discectomy and interbody fusion would be advisable, but that in the absence of such radicular left arm symptoms, there was only "a 50/50" chance that the claimant would benefit from such surgery. CX 29 at 283.

On April 12, 2003, the claimant was examined at the request of Gallagher Bassett by Dr. Anthony Woodward, a board-certified orthopedic surgeon. EX 2 at 44, EX 3 at 58. During the examination, the claimant complained of pain in his left cervical paraspinal muscles that was triggered when he rotated or extended his neck, aching pain in the back of his neck, intermittent pain in his right acromioclavicular joint, and pain over his right greater trochanter. EX 2 at 52. Furthermore, the claimant indicated that he experienced tenderness over "the superior aspect of the greater tuberosity" of his right shoulder and around "the 5th cervical vertebra in the midline." EX 2 at 54. Dr. Woodward also noted that the claimant's

chiropractor had previously observed that the claimant experienced shooting pain in his left cervical paraspinal muscles when rotating and extending his head. EX 2 at 46.

When Dr. Woodward conducted a neurological motor evaluation of the claimant's upper and lower extremities, he determined that all tested muscle groups had strength ratings of "5" on a five-point scale. EX 2 at 54. In addition, he found that the claimant had normal sensation during sensory examinations of his upper and lower extremities and negative results on Phalen tests. EX 2 at 54. Dr. Woodward also reviewed x-rays and MRIs from the claimant's medical record, and observed small "disc bulges" at levels C3-4 and C4-5 as well as "larger disc bulges" at C5-6 and C6-7 on the cervical MRI taken on October 14, 2002. EX 2 at 56. In concluding his report, Dr. Woodward set forth five "impressions" concerning the claimant's condition. EX 2 at 56. His first impression was that the claimant suffered from "[a]ge-related degeneration of the right shoulder, preexisting, manifest by degenerative changes in the acromioclavicular joint, the biceps tendon, and apparently the rotator cuff." EX 2 at 56. The second impression was "[s]tatus postoperative suture of the biceps tendon and apparently repair of a rotator cuff tear, preexisting, with persistent shoulder stiffness." EX 2 at 56. The final three impressions were a resolved right shoulder contusion, untreated trochanteric bursitis, and pre-existing cervical spondylosis. EX 2 at 56. Dr. Woodward also opined that the claimant

was able to return to work, that his condition had become permanent and stationary, that any permanent impairment was entirely due to conditions that existed prior to the claimant's work injury, and that the claimant needed no further medical care for that injury. EX 2 at 56.

On May 6, 2003, Dr. Kralick re-examined the claimant and reported that he was complaining of persistent neck pain that was radiating into his proximal right arm and more recently into his left upper extremity. CX 6 at 55. Dr. Kralick further noted that rotation of the claimant's neck was stiff, especially on the left and that the claimant's left elbow flexion and right deltoid function were weak. CX 6 at 55. Dr. Kralick also reviewed the October 14, 2002 MRI scan of the claimant's cervical spine and reported seeing a "disc herniation centrally at the C5-6 level and towards the left" and "[s]ignificant degenerative changes . . . at C6-7 centrally and towards the right with disc space narrowing and foraminal involvement." CX 6 at 55. Based on the foregoing information, Dr. Kralick recommended that the claimant consider undergoing disc excisions and interbody fusions at both the C5-6 and C6-7 levels. CX 6 at 55.

On July 16, 2003, Gallagher Bassett informed the claimant that it would "accept" his cervical condition, but would not authorize surgery on his cervical spine. CX 26 at 265. As grounds for refusing to authorize the surgery, a Gallagher Bassett representative cited the reports of Dr. Woodward and Dr. Waller. In addition, the representative also told the claimant that Dr.

Woodward had concluded that the claimant was capable of returning to his job as a gatehouse dispatcher. CX 26 at 265. According the representative's notes of the conversation, the claimant "disagreed and advised that he would never return to work in any capacity and that he wants to have surgery." EX 26 at 265. The notes further indicate that the claimant also told the Gallagher Bassett representative that the "employer would not take him back anyway without [a] full duty release." EX 26 at 266. The representative then reportedly told the claimant that she had a full duty release from Dr. Neumann and would be faxing it to the employer. EX 26 at 266.

In July 22, 2003, the claimant was re-examined by Dr. Kralick, who noted that the claimant had continuing neck pain and a limited range of motion in his neck. CX 6 at 53. Dr. Kralick's report also indicates that the claimant said that he had decided to undergo two-level disc surgery on his cervical spine as soon as the insurance details could be worked out. CX 6 at 53. Two days later, the claimant was examined by Dr. Wickler, who observed that the claimant was still having "difficulty with his right shoulder" and repeated his suspicion that the neck and shoulder symptoms were interrelated. CX 3 at 7. Dr. Wicker also indicated that he planned to wait until six months after the claimant's cervical surgery before re-evaluating his treatment of the claimant's shoulder. CX 3 at 7.

On October 28, 2003, Dr. Kralick re-examined the claimant and noted that he was complaining of

worsening neck pain. CX 6 at 52. Dr. Kralick reiterated his opinion that the claimant's neck problems were attributable to his work injury and again recommended surgical treatment. CX 6 at 52. Dr. Kralick also opined that the claimant would be unable to return to work as a longshoreman without additional treatment. CX 6 at 52. Likewise, on November 26, 2003, Dr. Henderson wrote a letter opining that the claimant's "ongoing right-shoulder and cervical symptoms are related to the injury of February 24th 2002." EX 21 at 473. Dr. Henderson also concluded that the claimant was still unable to return to his work as a longshoreman. EX 21 at 473.

According to the claimant's trial testimony, beginning in October of 2003 he and Dr. Kralick repeatedly asked Gallagher Bassett to authorize Dr. Kralick to perform surgery on the claimant's neck, but Gallagher Bassett did not respond until approximately January 10, 2004, which was the same day that the claimant was scheduled to meet with Dr. Kralick for a pre-operation visit. Tr. at 122. At that time, the claimant testified, Gallagher Bassett notified Dr. Kralick that it was refusing to authorize the surgery. Because of this refusal, the claimant sought and obtained authorization for the surgery from the health care plan administered by the Inland Boatman's Union ("I.B.U.") Health Benefit Trust. EX 14 at 320-21, EX 21 at 450, 466, 475.

On January 30, 2004, Dr. Kralick performed disc excision and fusion surgery at levels C5-C6 and C6-C7 of the claimant's cervical spine. CX 6 at 45-47.

According to the surgical report, Dr. Kralick removed disc material during the operation. However, the report does not specifically indicate whether Dr. Kralick observed any disc herniations or protrusions. CX 6 at 45-47.

On March 9, 2004, Dr. Kralick reported that the claimant's surgical incision had healed well and that the symptoms in his upper right extremities had improved. CX 6 at 42. However, he also noted that the claimant continued to experience "residual neck pain and soreness in the right shoulder." CX 6 at 42. When Dr. Kralick re-examined the claimant on April 20, 2004 he reported that the claimant had "no significant neck pains" but continued to report "some discomfort" in his right shoulder. CX 6 at 40. Accordingly, Dr. Kralick opined that the claimant could return to light duty work similar to "the dispatch position in which he was previously employed." CX 6 at 40.

On May 11, 2004, the claimant returned to Dr. Wickler to resume treatment for his ongoing right shoulder symptoms. CX 3 at 6. At that time, Dr. Wickler reported that the claimant had experienced a recurrence of right shoulder AC joint symptoms during physical therapy and requested an MRI of his right shoulder. CX 3 at 6. The MRI, which was performed on the following day, showed that the rotator cuff tear shown on the claimant's previous shoulder MRI scan had been repaired, but that there was some evidence of "chronic scarring or partial tearing or fraying at the tendinous insertion." CX 3 at 14. Likewise, when Dr. Wickler reviewed the MRI results, he

noted that the rotator cuff tear appeared to have healed but that there were "[s]ignificant degenerative changes" that were "consistent with [an] interarticular tear." CX 3 at 6. On that same day, Dr. Wickler discussed the risks of surgical treatment with the claimant and the claimant informed Dr. Wickler that he wanted his shoulder condition to be surgically treated. CX 3 at 6.

On July 6, 2004, the claimant testified in a deposition and reiterated his willingness and desire to return to his employment as a gatehouse dispatcher, if that kind of work would be available for him in Dutch Harbor. EX 15 at 47-49. He also testified that at that time he was performing home exercises, but did not participate in health club activities. EX 15 at 64. In addition, he testified that his cervical surgery had "absolutely" helped him by eliminating "pain running down [his] right arm, pain above [his] left elbow," and the feeling that two of his fingers were "frequently falling asleep." EX 15 at 77-78.

During July of 2004, the parties' attorneys engaged in negotiations concerning the shoulder surgery recommended by Dr. Wickler. EX 9. During the negotiations, the claimant's counsel offered to stipulate that the claimant had become capable of performing the duties of a gatehouse dispatcher, if the defendants would authorize Dr. Wickler to perform surgery on the claimant's right shoulder. EX 9 at 174. On July 30, 2004, the defendants' attorney sent the claimant's attorney a letter which stated that the defendants would authorize the shoulder surgery, but were not

conceding that the claimant's work injury had caused any more harm to the claimant's shoulder than had been diagnosed by Dr. Woodward. The letter also indicated that the defendants would pay the claimant time-loss benefits for a three-to-four-month period following the surgery, but that the defendants would not pay him any time-loss benefits for the period between the date of controversion of benefits and the shoulder surgery. EX 9 at 176. On August 12, 2004, the claimant's attorney sent the defendants' attorney draft stipulations concerning the claimant's shoulder surgery. EX 9 at 179-80. One of the paragraphs in the draft stipulations stated that the claimant had agreed that from March 10, 2004 until the date of his shoulder surgery, he was physically able to perform his gatehouse dispatcher job, and that he would "be able to return to the said job upon attaining maximum medical improvement from the shoulder surgery." EX 9 at 180. However, there is no evidence that any of the parties or their attorneys ever signed the proposed stipulations.

On September 1, 2004, Dr. Wickler performed an arthroscopic subacromial decompression, an acromioplasty, and an arthroscopic Mumford procedure on the claimant's right shoulder. CX 3 at 11-13. In his report of the surgery, Dr. Wickler listed as his "Final Diagnosis" the following conditions: post-traumatic AC joint arthritis, recurrent bone spur of the acromion, healed rotator cuff repair, and a healed SLAP repair. CX 3 at 11.

During a follow-up examination on September 3, 2004, Dr. Wickler observed that the claimant was doing well and instructed him to start a therapy program. CX 3 at 6. The claimant's continued improvement was also documented in subsequent medical examinations.

On October 26, 2004, Dr. Wickler examined the claimant and noted that although he experienced "residual impingement-type-pain" and "coracoid impingement pain on the subscap[,]" his motion was "almost back to normal." CX 3 at 6. Dr. Wicker also recommended that the claimant continue with physical therapy. CX 3 at 6.

On January 25, 2005, the claimant was re-examined by Dr. Kralick, who reported that the claimant had "occasional stiffness in his neck and right shoulder," but had denied "specific pain complaints in the neck" as well as any kind of radicular symptoms in his extremities. CX 6 at 39. Nonetheless, Dr. Kralick concluded that the claimant had "significant residual symptoms" and opined that it would "be unwise for him to return to the prior level of job activity involved in long-shore [sic] work." According to the claimant's trial testimony, Dr. Kralick believed it unwise to return to the longshore industry after the cervical fusion because of the inclement weather conditions and heavy work. Tr. at 178.

On February 3, 2005, Dr. Wickler re-examined the claimant and opined that the claimant should not return to heavy work as a longshoreman but that

some light duty work such as working as a dispatcher would be appropriate for the claimant. CX 3 at 5. He added that if such light duty work were not available to the claimant, he should start vocational rehabilitation. CX 3 at 5. Dr. Wickler also gave the claimant a prescription for a six-month membership to an athletic club in lieu of formal physical therapy. CX 3 at 5. However, because of the defendants' refusal to authorize payment for the membership, the claimant eventually paid the membership costs himself. Tr. at 135-36.

On July 12, 2005, Dr. Wickler concluded that the claimant's shoulder condition had reached the point of maximum medical improvement and requested that the claimant undergo a physical capacities evaluation to determine his ability to perform physical labor. CX 3 at 5. On the following day, Larry Seethaler, a licensed physical therapist, conducted a physical capacities evaluation on the claimant and found that the claimant is restricted to "light-medium" work, which he defined as occasionally lifting 30 pounds, frequently lifting 15 pounds, and constantly lifting 10 pounds. CX 1 at 1-3. In addition, on July 14, 2005, Dr. Wickler dictated a letter in which he explained that the claimant had reached maximum medical improvement and concluded that the claimant's shoulder injury had resulted in a 14% upper extremity impairment pursuant to the provisions of Table 15-27 at page 508 of the Fifth Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*.

On October 21, 2005, the claimant wrote to Mike Lynch, who was the manager of the CSX Lines terminal in Dutch Harbor at the time of the claimant's injury and had continued in that job after Horizon Lines had taken over management of the terminal. EX 24 at 212. In his letter to Mr. Lynch, the claimant noted that he had been previously told that there was no light work available to him at CSX Lines and asked if there had been any change in that policy since Horizon Lines had taken over the CSX terminal in Dutch Harbor. EX 24 at 212. The letter also explained that he had not achieved a full recovery from his February 2002 injury, but that Dr. Wickler and Dr. Kralick had concluded that he could perform light duty work. EX 24 at 212.

On October 26, 2005, Dr. Wickler reviewed Mr. Seethaler's evaluation of the claimant's physical capacities and agreed that it was consistent with his clinical examinations of the claimant. Dr. Wickler also agreed that the claimant had permanent lifting and carrying restrictions that restricted him to "light-medium" level work. CX 2 at 4.

On November 7, 2005, Mr. Lynch replied to the claimant's letter of October 21, 2006 by informing the claimant that a collective bargaining arrangement at the port of Dutch Harbor precludes longshore workers from returning to work on a light duty basis and that only those workers who have full-capacity releases can be re-employed at the port. CX 24 at 211, Tr. at 241. Ten days later, Horizon Lines posted a notice of a job opening in Dutch Harbor for a gatehouse

dispatcher. CX 25 at 212, Tr. at 271-72, 292-93. The announcement indicated that the minimum requirements for job applicants included computer literacy and supervisory experience. CX 25 at 212. In addition, the announcement specified that persons performing the job "must be willing and able to receive instructions and direct longshore personnel in accordance to company directives and AALA agreement," be "self motivated" have "strong communication and organizational skills," and be capable of performing "multiple tasks with a high attention to detail." CX 25 at 212.

On December 3, 2005, Dr. Woodward testified by deposition regarding his April 2003 examination of the claimant and resulting opinions. EX 16. During the deposition, Dr. Woodward testified that his examination indicated that the claimant generally had "good" ranges of motion in his shoulders and cervical spine, but some loss of external rotation in his right shoulder and slightly less-than-average left lateral motion in his neck. EX 16 at 20, 29. He also opined that the claimant's shoulder and cervical surgeries were necessitated by conditions that were due solely to his preexisting osteoarthritis and not to his work-related injury. EX 16 at 17, 20, 27. Dr. Woodward did acknowledge, however, that trauma can sometimes aggravate an asymptomatic degenerative joint disease such as osteoarthritis. EX 16 at 50-51. In addition, during the deposition the parties stipulated that, if asked, Dr. Woodward would testify that in his opinion the claimant is capable of performing all the light-to-medium jobs included in an occupational

report attached to the deposition transcript. EX 16 at 28-29.

In explaining his opinion concerning the claimant's right shoulder, Dr. Woodward noted that the October 5, 2001 MRI scan of the claimant's shoulder showed "moderately severe acromioclavicular osteoarthritis with spurs" and observed that the claimant had told Dr. Wickler in 2001 that he had been experiencing difficulties with his right shoulder "for several years." EX 16 at 9-10. In addition, Dr. Woodward admitted that it's "possible" that the claimant's right shoulder condition could have been aggravated when he fell, but opined that no such aggravation actually occurred because a subsequent MRI of the claimant's right shoulder showed that the claimant's "[m]oderately severe acromioclavicular osteoarthritis" was unchanged. EX 16 at 21 57. In addition, he pointed out that Dr. Wickler's initially diagnosed the claimant's right shoulder injury as being merely a "first degree sprain of the acromioclavicular joint." EX 16 at 15-16. Dr. Woodward also noted that Dr. Wickler's report of his second surgery on the claimant's right shoulder indicated that the earlier rotator cuff repair and SLAP lesion repair were intact. EX 16 at 55-56. Thus, Dr. Woodward opined, the only reason for the second surgery was to correct "preexisting unrelated osteoarthritis of the acromioclavicular joint" and not for the purpose of treating any work-related injury. EX 16 at 17, 20-21.

Dr. Woodward also provided various reasons for his opinion that the claimant's work injury did not

cause any harm to the claimant's cervical spine. In particular, he asserted that there were no objective findings of reduced ranges of motion in the claimant's neck until eight or nine months after his work injury and opined that the disc abnormalities shown on the MRI scan of the claimant's cervical spine were solely as a result of degenerative changes rather than the result of any work-related trauma. EX 16 at 26, 43. In explaining his opinion about the degenerative changes in the claimant's cervical spine, Dr. Woodward noted that "[o]steophytes are characteristic of degenerative changes" and pointed out that Dr. Kralick's operative report indicates that he observed "osteoarthritic ridging" and osteophytes at the C5 and C6 levels of the claimant's cervical spine. EX 16 at 23. Dr. Woodward acknowledged that he had described the "protrusions" and "extrusions" mentioned in the radiologist's report of the claimant's cervical MRI as "bulges," but asserted that there is no standardization of the language used by radiologists to describe disc abnormalities. EX 16 at 39-40, 62. He also testified that the references in Dr. Kralick's surgical report to removal of disc material from the claimant's cervical spine don't necessarily refer to material from herniated discs because fusion surgery always requires the removal of disc material, even when there are no disc herniations. EX 16 at 45. Dr. Woodward also acknowledged that such fusion surgeries are sometimes performed to relieve cervical radiculopathy or an injury to a nerve root, but asserted that in the claimant's case there was no evidence of right radiculopathy or

neurological deficits consistent with disc pressure on nerve root. EX 16 at 8, 23-24.

On December 31, 2005, Mr. Lynch sent the claimant a second response to his inquiry about returning to work as a gatehouse dispatcher. EX 38 at 576. In this response, Mr. Lynch asserted, "you would likely be able to be employed under the special agreements between the employers and the union for the positions of a checker and certain gang boss/walking boss jobs, as well as Union Hall dispatcher. I presume that you know that other union members with permanent disabling conditions have been employed in skilled positions over a number of years. With your A card I presume that you would easily be able to obtain work with the employers in those positions even with your work restrictions." EX 38 at 576.

On January 4, 2006, Dr. Kralick reviewed the physical capacities evaluation prepared by Mr. Seethaler and agreed that the claimant should be permanently restricted to "light-medium" level work. CX 5 at 38.

During the trial, Mr. Lynch testified that the letter he sent the claimant on December 31, 2005 was intended to ensure that Horizon Lines complied with the Americans with Disabilities Act requirement that employers provide reasonable accommodations to injured workers. Tr. at 260-65, 276-77. Mr. Lynch also testified that although CSX Lines employed two gatehouse dispatchers at the time of the claimant's work injury, after the claimant stopped working in March

of 2002 the company decided not to hire a permanent replacement and instead supplemented the work of the other permanent dispatcher with the services of temporary or part-time workers. Tr. at 252-54. According to Mr. Lynch, the decision not to hire a permanent full-time replacement for the claimant was also attributable to a decrease in the terminal's workload, improved technology, and a decision to no longer keep the gatehouse open 24 hours a day. Tr. at 250-53, 280-81, 290.

Mr. Lynch also testified that since the early 1990s longshore employers at Dutch Harbor have not allowed injured longshore workers to return to work unless they have a "full work release" and the "union has cooperatively agreed to support that program." Tr. at 258-60, 279-80. However, he explained, there have been occasions when special arrangements were made to allow employees who lacked full-duty releases to take some of the less physically demanding longshore jobs. Tr. at 258-59, 261-62. In this regard, Mr. Lynch acknowledged that as Horizon's terminal manager he had the authority to make accommodations or special arrangements that might have enabled the claimant to return to work as a gatehouse dispatcher. Tr. at 275.

According to the claimant's trial testimony, he has not worked since his February 24, 2002 work injury, but would return to work as a gatehouse dispatcher if he were not required to exit the gatehouse. Tr. at 157, 192-93. He also denied ever telling a Gallagher Bassett representative that he had "no intention" of

returning to work under any circumstances. Tr. at 190. However, the claimant acknowledged that no longer resides in Dutch Harbor and has sold a home that he previously owned near that port. EX 2 at 53.

ANALYSIS

The parties have stipulated, *inter alia*: (1) that the claimant sustained a slip-and-fall injury arising out of and in the course of his employment by CSX Lines on February 24, 2002, (2) that the claimant was injured at a maritime situs, (3) that the claimant provided timely notice of his injury and filed a timely claim, and (4) that an employer-employee relationship existed between the claimant and CSX Lines at the time of the injury. Tr. at 37-39, 47-48.

The following issues are in dispute: (1) the applicability of subsection 2(3)(A) of the Longshore Act to the claimant, (2) the existence of a causal relationship between the claimant's work-related injury of February 24, 2002 and his cervical and right arm impairments, (3) the extent of the employer's liability for medical expenses, (4) the appropriate method for calculating the claimant's average weekly wage, (5) the date the claimant's injuries reached the point of maximum medical improvement, and (6) the extent of the claimant's entitlement to disability benefits.

1. Applicability of the Subsection 2(3)(A) Exclusion

A claim for a work-related injury is not compensable under the Longshore Act unless the injury occurred while the injured worker had "status" as a maritime employee. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45-46 (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 267 (1977). Under subsection 2(3) of the Act, maritime status is generally granted to any person "engaged in maritime employment, including "any longshoreman or other person engaged in longshoring operations." However, in 1984 Congress amended subsection 2(3) to explicitly exclude various categories of maritime workers from coverage under the Act. One of these categories of excluded maritime workers is defined in subsection 2(3)(A) of the Act as including "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work" if such workers are covered under a state workers' compensation statute.

In the years following the enactment of the 1984 amendments, the Benefits Review Board (BRB) has applied the subsection 2(3)(A) exemption to workers whose jobs are limited to the performance of routine clerical activities of the kind that are typically performed in office settings. *See Hall v. Newport News Shipbuilding and Dry Dock Co.* 24 BRBS 1 (1990) (holding that a claimant who performed "solely data processing functions" as a keypunch operator was excluded from Longshore Act coverage); *Williams v. Newport News Shipbuilding and Dry Dock Co.*,

28 BRBS 42 (1994) (holding that a clerk who was responsible for copying and reproducing documents in an office setting was excluded from coverage). Likewise, the BRB has applied the exemption to such workers in cases where their clerical duties would sporadically require them to leave their office work sites or whose out-of-office activities were merely incidental to their clerical duties. *See Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005) (affirming a decision that a quality assurance clerk, whose duties included typing, filing, verifying data, and data entry was excluded from Longshore Act coverage because she did not make "substantive decisions," primarily worked in an office setting, and left her office work space only on rare occasions for purposes incidental to clerical work); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996), (holding that a claimant who performed various clerical duties in a trailer office but occasionally went outside and on-board ships under construction was not covered under the Act because her trips away from her office were "merely incidental to her clerical work" and "sporadic"). In addition, in cases arising in the Third Circuit the BRB has applied the exemption to office workers whose jobs do not involve loading or unloading cargo because such workers do not even have maritime status under the Third Circuit's decisions in *Maher Terminals v. Farrell*, 548 F.2d 476 (3rd Cir. 1977), and *Sea-Land Services, Inc. v. Rock*, 953 F.2d 56 (3rd Cir. 1992). *See Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993) (holding that under the Third Circuit's decisions in *Farrell* and *Rock*, a "delivery clerk" who

worked in a marine terminal office and gave truck drivers paperwork they needed when removing cargo from a container yard and exiting the terminal was not covered under the Longshore Act).

However, when a worker's duties have included tasks that are not exclusively clerical or entailed at least some tasks that are regularly performed outside an office, the BRB and the courts have held that the exception is inapplicable. *See Wheeler v. Newport News Shipbuilding and Dry Dock Co.*, 39 BRBS 49 (2005) (holding that a senior engineering analyst did not fall under the clerical exclusion because his duties "involved the exercise of judgment and expertise beyond that exhibited by clerical workers" and were "not performed exclusively in an office"[3]); *Boone v. Newport News Shipbuilding and Dry Dock Co.*, 37 BRBS 1 (2003) (holding that a claimant was not excluded from Longshore Act coverage even though she was a

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[3] In *Wheeler*, the claimant primarily worked in an office at a desk, and was responsible for visually inspecting parts, filling out paperwork necessary to obtain replacement parts, consulting with engineers, and reviewing plan specifications. *Id.* at 51-52. He occasionally left his office area to perform his duties at the employer's shops, warehouses, or vessels. *Id.* The BRB determined that the claimant's employment duties were more than mere data entry and processing because he was required to interpret, review, and analyze information and make suggestions. *Id.* Accordingly, the BRB affirmed the administrative law judge's finding that the claimant's job as a senior engineering analyst "required the exercise of judgment and expertise of a kind that goes beyond the simple record making or record storage typical of clerical work." *Id.* at 52.

clerk within the definition of subsection 2(3)(A), because all her work was performed in a warehouse rather than in an office); *Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994) (holding that a "marine dispatcher" whose duties were mostly clerical was not subject to the subsection 2(3)(A) exclusion because his job also required him to regularly lift 35-to-50-pound boxes of motion-picture film that was destined to be loaded on passenger ships). *See also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407 (2nd Cir. 2005) (reasoning that the reference to "data processing" in the subsection 2(3)(A) exclusion is limited to workers who exclusively process data and paperwork and was therefore inapplicable to a "test engineer" who also analyzed data).

Likewise, the BRB has held that the subsection 2(3)(A) exemption is inapplicable when a worker's duties are integral to loading or unloading ships. *See Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991) (finding a "timekeeper" who usually worked in an office preparing payrolls and allocating payroll costs nonetheless "performed functions which were maritime and integral to the loading and unloading process" because his duties included responsibility for "checking in" longshore workers on the docks and asking a hiring hall send more men when help was needed); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Association*, 22 BRBS 434 (1989) (holding that a "night dispatcher" was not excluded from coverage under subsection 2(3)(A) because, *inter alia*, his obligation to ensure

that work crews were fully manned to load and unload ships was "not exclusively clerical" and was "integral to the longshoring process"); *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989) (holding that subsection 2(3)(A) did not preclude a "clerk-checker" from recovering Longshore Act benefits for an injury he suffered while working as a "clerk" because the claimant's work hours were tied to the movement of cargo, his clerical duties pertained to cargo removal, and he "was subject to reassignment as a checker"); *Riggio v. Maher Terminals*, 31 BRBS 58 (1997) (holding that even in the Third Circuit, work as a "checker" is "indisputably longshore activity" and not within the scope of the subsection 2(3)(A) exclusion).

In this case, the defendants concede that the claimant had status as a maritime worker under the provisions of subsection 2(3) at the time of his work injury, but argue that he is not entitled to Longshore Act benefits because his job as a gatehouse dispatcher entailed only office clerical duties and was therefore within the scope of the subsection 2(3)(A) exclusion. Conversely, the claimant contends that his job as a gatehouse dispatcher did not fall within the scope of the exclusion.

Three witnesses provided detailed testimony concerning the gatehouse dispatcher's duties: Michael Lynch, the terminal manager; Bruce McConnell, the gatehouse manager; and the claimant.

According to Mr. Lynch, CSX Lines' gatehouse dispatcher in Dutch Harbor normally works in a double-wide modular trailer "gatehouse" that sits on a concrete foundation beside a 70-foot long Toledo truck scale. Tr. at 255. Mr. Lynch explained that the gatehouse dispatcher's "desk/work station" is located next to a bay window adjacent to the truck scale so that the dispatcher can exchange papers and communicate with truck drivers as they come across the scale. Tr. at 255. In Mr. Lynch's view, the gatehouse dispatcher's job duties also include responsibility for tracking the movement of freight into and out of the employer's Dutch Harbor terminal and an obligation to efficiently dispatch drivers to deliver and pick up "vans" for customers at "shore plants." Tr. at 254-55. He further described the job as requiring the dispatcher to sit at a desk and as sometimes being so monotonous that dispatchers will carry a cordless phone and "walk around the gatehouse just to stretch their legs." Tr. at 255-56. However, Mr. Lynch acknowledged that on some occasions gatehouse dispatchers have gone outside the gatehouse to verify a container location if "yard dogs" who normally have this duty were unavailable. Moreover, he added, "[w]e sure don't want the dispatcher not to go out there if nobody else is available." Tr. at 257. Likewise, he testified, there have been "rare" situations where containers that were bulging after transportation over rough seas have been parked next to the gatehouse and inspected. Tr. at 257. In such situations, Mr. Lynch remarked, "[i]f no one else is on duty dispatchers have to be conscientious enough to take it upon themselves

and do what needs to get done in regards to that." Tr. at 257-58.

According to Mr. McConnell's testimony, the primary duties of a gatehouse dispatcher at Dutch Harbor are answering phone calls from customers seeking to have freight picked up or delivered, scheduling pick ups and deliveries, dispatching truck drivers to the customers, logging the dispatches into a computer, and running reports concerning these activities. Tr. at 286-87. Mr. McConnell further testified that the dispatcher's duties are performed in the gatehouse and that he could not think of "a lot" that the dispatcher would do outside of the gatehouse. Tr. at 285, 287. In particular, Mr. McConnell testified that he could not think of any circumstances that would require the dispatcher to go the company's dock, which he noted was over a mile away, and commented that "it's not something that would be commonly done." Tr. at 288-89. He also testified that truck drivers are the ones with responsibility for opening the doors on shipping containers and, to his knowledge, such work "isn't typically done" by dispatchers. Tr. at 288-89. However, Mr. McConnell acknowledged that although "most of the time" so-called "yard dogs' are responsible for searching the terminal's freight yard to find missing container numbers, he's sure that on some occasions a dispatcher has gone out to the freight yard to look for a missing number. Tr. at 287-88, 295. He also acknowledged that the gatehouse dispatcher has "supervisory" responsibilities insofar as the dispatcher is required to supervise "road drivers"

in performing pickups and deliveries and to the extent that the dispatcher has to tell top pick operators to go to certain stacks and pick up certain containers. Tr. at 294. Mr. McConnell also conceded that the work of the gatehouse dispatcher is a "pretty essential part" of the operation of his firm's Dutch Harbor terminal. Tr. at 296.

The claimant's testimony concerning his duties as a gatehouse dispatcher is generally consistent with the testimony of Mr. Lynch and Mr. McConnell, but contains more details concerning the various functions he performed while working as a gatehouse dispatcher.

For example, the claimant's testimony indicates that his job required him to plan and supervise the storage and movement of the ocean shipping containers that are constantly moving through the employer's Dutch Harbor terminal. Thus, the claimant testified, performance of his job required him to work closely with two yard foreman to organize the containers in the terminal's freight yard. Tr. at 85-86, 88-89. Likewise, he testified that he advised yard foremen about outbound containers that needed to "get out of town as soon as possible" and also told them which vessel hatches needed to be unloaded first to ensure prompt delivery of incoming containers needing expedited handling. Tr. at 86-89. In addition, the claimant testified that when factory trawler ships docked at Dutch Harbor and unloaded the equivalent of 40 to 60 containers of frozen fish, the gatehouse dispatcher would be responsible for determining what

types of containers would be needed for transshipping the cargo to other ports, ensuring the availability of each type of container, and finding yard space for efficiently storing the necessary containers. Tr. at 90-92. According to the claimant, performance of these and similar responsibilities, required him to do "a lot of . . . thinking" and meant that he had to "make decisions all day long." Tr. at 198-99.

The claimant's testimony also indicates that his job as a gatehouse dispatcher required him to conduct various types of inspections of the containers moving into and out of the employer's freight yard. For example, the claimant explained that when a driver delivering a loaded container appeared outside the dispatcher's window, part of the gatehouse dispatcher's job was to make sure that there was a load tag on the front of the container, that the driver's paperwork had all the important information, and that the load wasn't excessively overweight. Tr. at 94-95, 210-13. In addition, the claimant testified, as the driver pulled away, the dispatcher would "get a visual" on the container doors to make sure that they were closed and that a seal was on the door. Tr. at 212. Likewise, the claimant added, on those occasions when a driver told the gatehouse dispatcher that a container might have been improperly loaded, the dispatcher might have to go outside the gatehouse to look inside the container. Tr. at 95. In such situations, the claimant explained, it would be necessary to break the seal on the container, attach a new seal, and inform others that the seal had been changed. Tr. at 95-96, 212-13. Similarly,

he added, the dispatcher might have to leave the gatehouse to inspect a container that a driver didn't believe was in suitable condition to be loaded. Tr. at 212.

According to the claimant's testimony, his job responsibilities also made it necessary for him to occasionally leave the gatehouse and go to other locations in or near the employer's terminal. For instance, the claimant testified, on weekends, gatehouse dispatchers "ran the show" and during such periods it might be necessary for the dispatcher to go to the freight yard to locate recently off-loaded containers if the locations of the containers had not yet been entered into the gatehouse computer. Tr. at 97-98. On other occasions, he added, the gatehouse dispatcher might have to accompany customers to the freight yard so that the customers could see what was inside particular incoming containers. Tr. at 98. In addition, the claimant recalled that there were times when he would drive to a nearby American President Lines (APL) dock to determine if there were any CSX containers that were fully loaded and ready to be picked up. Tr. at 195-96. If he found such a CSX container, he testified, he would close the container doors, attach a seal, and later direct a driver to pick up the container. Tr. at 195-96. The claimant's testimony also indicates that he would sometimes leave the gatehouse to help a driver or customer deal with some kind of unusual problem that was preventing freight from being moved as planned. As examples of such events, the claimant explained that sometimes

drivers would ask that someone "hold the door" so they could back a container up to a loading dock or would need someone to bring them a "load lock" to help in handling containers that had freight packed right up to the doors. Tr. at 99, 176. On other occasions, he noted, he might go to a dock to help a driver deal with broken pallets of frozen fish that were slowing down an unloading process. Tr. at 99-100. The claimant's testimony about his out-of-office activities was corroborated in part by the testimony of Dan Kondak, a longshoreman who has worked at Dutch Harbor since 1981. Tr. at 225-26. According to Mr. Kondak, while working as a longshoreman he would "generally" see the claimant working at the gatehouse, but "it wouldn't be uncommon to see him anywhere." Tr. at 229

Although the claimant's testimony indicates that there were a number of different reasons for a gatehouse dispatcher to leave the gatehouse, the claimant acknowledges that his departures from the gatehouse were not regularly scheduled events and that their frequency varied depending on the circumstances. In fact, he testified, there were some weeks when he never left the building and other times when he would leave the gatehouse on two to three occasions in a single day. Tr. at 209. On an average basis, the claimant estimated, he went to the freight yard about once each weekend and to the dock no more than two to three times a month. Tr. at 209. The claimant also acknowledged that at least some of his activities outside the gatehouse were not part of the dispatcher's

formal job description, but asserted that his employer "certainly" knew of the activities and did not discourage them. Tr. at 100-01.

In contending that gatehouse dispatchers are excluded from Longshore Act coverage, the defendants acknowledge the evidence indicating that gatehouse dispatchers must occasionally leave the gatehouse to perform some parts of their jobs. However, the defendants argue that these out-of-the-office activities are "episodic, momentary, and in furtherance of clerical duties" that do not expose the gatehouse dispatchers to "the hazards of longshoring." In contrast, the claimant contends that his job was not "exclusively clerical" and therefore would not fall within the scope of the subsection 2(3)(A) exclusion even if he never had to leave the gatehouse.

After considering all the relevant evidence and precedents, it has been concluded that the work the claimant performed as a gatehouse dispatcher was not exclusively clerical and that the exclusion is therefore inapplicable to the claimant. Indeed, the evidence shows that major elements of the claimant's work duties made it necessary for him to routinely make decisions requiring a far greater degree of judgment and expertise than would normally be expected from workers whose duties are limited to document filing, data entry, and record keeping. For example, the claimant's work with the yard foremen in organizing the storage of containers in the employer's freight yard and his responsibility for making sure that the necessary quantities and types of containers were

available for the prompt transshipment of frozen fish are just two of the claimant's job duties that require experience and expertise not expected from ordinary clerical workers. Similarly, the evidence shows that the claimant had to exercise both analytical and supervisory skills not required from clerical workers when he worked with yardmen to speed up the departure and delivery of containers needing expedited handling. In addition, even if the claimant's work in dispatching drivers could be characterized as being clerical, the evidence shows that the claimant's dispatching duties also implicitly included an additional responsibility that required him to do whatever was reasonably necessary to solve problems that arose when drivers were delivering and picking up cargo, even if he had to leave the gatehouse to locate a missing container, open a container to determine its contents, or help a driver deal with an unexpected difficulty. It is also noted that these kinds of non-clerical activities by the claimant were hardly the *ultra vires* acts of an overenthusiastic employee. To the contrary, the December 2005 vacancy announcement for a gatehouse dispatcher shows that the employer believes that "supervisory experience" and "organizational skills" are necessary to perform the job. CX 25 at 212 (vacancy announcement). Likewise, Mr. Lynch's trial testimony shows that the employer expects gatehouse dispatchers to do whatever needs to be done to serve the customers. Tr. at 257-58 (testimony of Mr. Lynch).

2. Relationship between the Work Injury and the Claimant's Cervical and Right Shoulder Impairments

Under subsection 2(2) of the Act, a worker's injury is not compensable unless there is a showing that the injury arose out of and in the course of the worker's employment. Claimants are aided in this regard by subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary – (a) that the claim comes within the provisions of this Act." However, to invoke this presumption, a claimant must prove that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, a claimant has the burden of proving the existence of working conditions or an accident that could have caused his or her impairment, and merely proving that an impairment exists is not enough to invoke the presumption. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982) (holding that "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer"). Once the subsection 20(a) presumption has been properly invoked, the employer is assigned the burden of presenting substantial evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the

presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the decision of the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant.

In this case, the claimant asserts that the surgeries on his neck and right shoulder as well as the corresponding periods of temporary disability and related permanent impairments are all attributable to the work-related injury he suffered on February 24, 2002. In contrast, the defendants assert that there is no causal relationship between the claimant's work injury and either of the surgeries. Rather, they contend, any disability or need for medical treatment attributable to the work injury ended within a few months after the injury. Analysis of the evidence supporting these contentions is set forth below.

A. Cervical Impairment

In order to support his claim that his work injury resulted in harm to his neck, the claimant has submitted into evidence a radiologist's report indicating that an October 14, 2002 MRI of his cervical spine showed a disc "protrusion" at level C6-7 and a disc "extrusion" at level C5-6. CX 7 at 69. In addition, the claimant has submitted medical records showing that he complained of nearly constant neck pain to Dr.

Henderson on March 21, 2002 and that on that same date Dr. Henderson reported positive findings on a test for cervical nerve root compression. CX 10 at 129-30. Hence, the claimant is entitled to invoke the subsection 20(a) presumption if he has provided evidence indicating that events occurring during the course of his employment by CSX Lines could have caused these cervical abnormalities. In order to satisfy this requirement, the claimant has produced statements from Dr. Henderson, Dr. Kralick, and Dr. Wickler indicating that they all have reason to believe that his cervical ailments were caused by trauma from his fall. CX 10 at 92 (Dr. Henderson), CX 6 at 52 (Dr. Kralick), EX 21 at 453 (Dr. Wickler). All of the foregoing evidence is entirely credible. Accordingly, the claimant has presented evidence that is sufficient to warrant invocation of the subsection 20(a) presumption.

In response, the defendants rely on testimony and a medical report in which Dr. Woodward opines that the claimant's cervical ailments are solely attributable to his pre-existing degenerative osteoarthritis. EX 2, EX 16. In addition, the defendants argue that Dr. Woodward's opinion is consistent with Dr. Waller's characterization of the claimant's cervical spine disorder as being "degenerative." CX 29 at 281-83. Such evidence is substantial enough to rebut the subsection 20(a) presumption. It is therefore necessary to weigh all of the evidence to determine if the claimant has shown a causal relationship between his employment and his cervical impairment. After weighing

all of the evidence, it has been concluded that the claimant has met his burden of showing such a causal connection by a preponderance of the evidence. There are four reasons for this conclusion.

First, as noted by Dr. Henderson, there is no evidence that the claimant ever had any symptoms of a neck impairment prior to his work injury of February 24, 2002. CX 10 at 92.

Second, medical records indicate that the claimant sought treatment for neck pain within a few weeks after his work injury and that as early as March 21, 2002, he reported to Dr. Henderson that he was experiencing constant pain in the left side of his neck. CX 10 at 129. Likewise, on that same day, Dr. Henderson found evidence of cervical nerve root compression and Dr. Wickler reported that the claimant had complaints of "mid and upper thoracic pain" that he attributed to the claimant's work injury. CX 10 at 129 (Dr. Henderson), CX 3 at 10 (Dr. Wickler). Although the claimant did not mention any neck symptoms when he reported his injuries to the employer on February 24, 2002, it is entirely possible that he conflated any neck symptoms with the symptoms of his right shoulder injury. Moreover, it is likely that any neck pains the claimant might have felt during the following days would have been partially or wholly masked by the pain medications prescribed for him at the Illiliuk Family and Health Services. EX 31 at 566 (showing that the claimant was prescribed Vioxx and Tylenol No. 3 for pain relief on February 28, 2002).

Third, although Dr. Woodward has opined that the claimant's neck impairment is entirely degenerative and unrelated to his work injury, his opinion is less convincing that [sic] the opinions of Dr. Henderson, Dr. Kralick, and Dr. Wickler, all of whom conducted many more examinations of the claimant than Dr. Woodward and thus have a greater knowledge of his medical history. Moreover, even though Dr. Waller did describe the claimant's neck impairment as being "degenerative," review of Dr. Waller's report clearly indicates that the only issue he thought he was addressing in the report was "whether or not surgical fusion of the degenerated disc will solve the problem." CX 29 at 283. Hence, any opinion he may have seemed to express concerning the cause of the claimant's impairment was entirely gratuitous and therefore unlikely to have been carefully considered. Moreover, there is no reason to assume that Dr. Waller has ruled out the possibility that a pre-existing degenerative condition was in some [sic] aggravated by the claimant's work injury. It is also noted that Dr. Woodward's opinion is further undermined by the fact that he has partially based his opinion on the factually incorrect assumption that the claimant did not have any loss of motion in his cervical spine until eight or nine months after his work injury, even though medical records clearly show that Dr. Henderson found a loss of cervical range of motion as early as April 22, 2002. EX 16 at 26 (Dr. Woodward's deposition testimony), EX 30 at 547 (report of Dr. Henderson). Moreover, even though there is no formal standardization of language used by radiologists to describe disc

abnormalities, Dr. Woodward's use of the term "bulges" to describe the disc abnormalities shown on the MRI scan of the claimant's cervical spine does not appear to be consistent with the radiologist's report. That report, unlike Dr. Woodward, uses the words "protrusion" and "extrusion," which are terms that are more consistent with a traumatic injury than the word "bulge," which implies that an abnormality is solely due to a gradual process.

Fourth, the defendants are unconvincing in contending that the claimant is not a credible witness because he allegedly attempted to "influence the opinions" of his medical providers on questions of causation and treatment. Although the record does contain various letters that the claimant sent to his medical care providers concerning his workers' compensation claim, there is nothing in any of these letters indicating that the claimant ever made any misrepresentations to these providers or that that he ever asked any of them to make misrepresentations on his behalf. Similarly, the defendants' post-trial brief is unpersuasive insofar as it argues that the claimant admitted to a Gallagher Bassett representative that he had "no intention" of ever returning to work. Although the record does include notes of a telephone conversation which indicate that the claimant told a Gallagher Bassett representative that he "would never return to work in any capacity," the claimant has denied telling the representative that he had "no intention" of returning to work. CX 26 at 265-66 (Gallagher Bassett records), Tr. at 190 (claimant's

testimony). Moreover, review of the notes indicates that the claimant's statement about never returning to work was made during the course of a discussion in which he was adamantly seeking authorization for surgery on his cervical spine. CX 26 at 265-66. It therefore appears that instead of telling the Gallagher Bassett representative that he had "no intention" of ever returning to work, the claimant was actually arguing that he had no expectation of ever being able to return to work unless he had such surgery.[4] Conversely, it is unlikely that the claimant

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[4] It is noted in this regard that the defendants' post-trial brief suggests that the undersigned Administrative Law Judge's on-the-record comments about a recent whistleblower case concerning Gallagher Bassett's failure to promptly pay a claim by a former employee of United Airlines in some way implies that undue weight will be given to the claimant's version of his conversation with the Gallagher Bassett representative. Any such inference is unwarranted. Although jocular comments were made about the similarities between Gallagher Bassett's failure to pay for the claimant's physical therapy at an athletic club and Gallagher Bassett's failure to promptly pay benefits that had been awarded to a former employee of United Airlines by California's Workers' Compensation Appeals Board, no opinions were expressed concerning the credibility of Gallagher Bassett or its claims examiners. Tr. at 135-37, 191 (comments of the Administrative Law Judge describing how the frequent reassignment of cases to different claims examiners caused Gallagher Bassett to "lose track" of events occurring in those cases). In any event, no consideration whatsoever was given to Gallagher Bassett's handling of the United Airlines claim when resolving any of the issues in this case, including the defendants' allegation that the claimant admitted that he had no intention of ever returning to work. *See also Liteky v. United States*, 510 U.S. 540, 553-54 n.2 (1994) (noting that "[t]he objective appearance of an

(Continued on following page)

would have believed that he could have obtained Gallagher Bassett's authorization for the surgery by telling the representative that he had no intention of ever returning to work. Indeed, the claimant would have surely realized that any such statement would have probably made it less likely that the surgery would be authorized.

B. Right Shoulder Impairment

In order to support his claim that his work injury resulted in a permanent harm to his right shoulder, the claimant has submitted into evidence various medical records showing that the claimant complained of right shoulder pain and limitations in his ability to use his right shoulder from February of 2002 until undergoing a second shoulder surgery in September of 2004. CX 3. In addition, the claimant has provided medical records showing that after performing that surgery, Dr. Wickler diagnosed the claimant's shoulder condition as "posttraumatic AC joint arthritis." CX 3 at 6. Hence, the claimant is entitled to invoke the subsection 20(a) presumption if he has provided evidence indicating that events occurring during the course of his employment by CSX Lines could have caused, aggravated, accelerated, or otherwise worsened his shoulder condition.

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adverse disposition attributable to information acquired in a prior trial is not an objective appearance of personal bias and prejudice, and hence not an objective appearance of improper partiality").

As previously noted, the claimant testified that he landed on his right side after slipping on some ice at work on February 24, 2002, and that when he got up he felt a soreness in his right shoulder. Tr. at 110-12. In addition, the claimant has submitted a July 30, 2002 chart note in which Dr. Wickler commented that he thought the increase in the claimant's right shoulder symptoms after February 24, 2002 was "directly related" to that injury. CX 3 at 9. Hence, the claimant has presented enough evidence to justify invoking the subsection 20(a) presumption.

The defendants' contention that there was no causal relationship between the claimant's work injury and his subsequent right shoulder problems is primarily based on the report and testimony of Dr. Woodward. As indicated in that report and testimony, Dr. Woodward has opined that any need for treatment of any right shoulder injuries the claimant might have suffered on February 24, 2002 ended in April of 2002 and that any remaining shoulder symptoms are solely the result of pre-existing osteoarthritis. EX 16 at 17, 20-21. (deposition testimony). As support for this contention, Dr. Woodward has pointed out that the radiologist who interpreted the March 12, 2002 MRI of the claimant's right shoulder did not see any changes in the moderately severe acromioclavicular osteoarthritis shown on the October 5, 2001 MRI of the same shoulder. EX 16 at 15 (testimony of Dr. Woodward), CX 3 at 25 (radiologist's report). Such evidence is substantial enough to rebut the subsection 20(a) presumption. It is therefore necessary to

weigh all of the evidence to determine if the claimant has shown a causal relationship between his employment and his right shoulder condition. After weighing all of the evidence, it has been concluded that the claimant has met his burden of showing such a causal connection by a preponderance of the evidence. The following three considerations have led to this conclusion.

First, the evidence indicates that the claimant experienced pain in his right shoulder area immediately after his fall and mentioned "shoulder pain" in the injury report he subsequently gave the employer. CX 19 at 206.

Second, although the radiologist who performed the March 12, 2002 MRI of the claimant's right shoulder did not see any changes in the moderately severe acromioclavicular osteoarthritis shown on the October 5, 2001 MRI of the same shoulder,[5] there is other credible evidence which suggests that the claimant's work injury did in fact cause a long-term aggravation of the claimant's pre-existing right shoulder condition. Most importantly, the evidence shows

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[5] In addition, it is noted that the defendants' post-trial brief also contends that the range of motion in the claimant's right shoulder on March 12, 2002 was actually better than it was when measured by Dr. Wickler on February 5, 2002. This assertion is not entirely correct. Although the measurements made by Dr. Wickler on March 12, 2002 showed that the claimant had a slightly improved ability to elevate his right arm, his range of external rotation was slightly worse and his range of internal rotation was unchanged. EX 3 at 10.

that in the months following the claimant's work injury he repeatedly complained of a loss of strength and pain in his right shoulder. For example, Dr. Wickler's report of his March 12, 2002 examination of the claimant indicates that the claimant had "lost strength" in his shoulder. Likewise, Dr. Wickler's records show that the claimant complained of pain in the anterior and upper parts of his shoulder during an office visit on March 21, 2002 and continued to complain of shoulder pain during examinations in April, May, June, July, September and October of 2002, March and July of 2003, and May and August of 2004. CX 3 at 6-10. Indeed, as previously noted, on July 30, 2002 these continuing complaints of pain prompted Dr. Wickler to comment that the increase in the claimant's "AC joint symptoms" since his work injury had led him to conclude that there was a direct relationship between the increased symptoms and the work injury. EX 3 at 9. Dr. Wickler's records concerning the claimant's continuing complaints of shoulder pain are corroborated by the August 5, 2002 report of Dr. Neumann, who also noted that the claimant continued to complain of pain in his right shoulder. CX 27 at 272.

Third, Dr. Wickler's opinion concerning the cause of the claimant's right shoulder impairment is more convincing than the contrary opinion of Dr. Woodward. Although the legal doctrine giving special weight to the opinions of treating physicians might not extend to opinions concerning causation issues, in this case there are independent reasons for concluding that

Dr. Wickler's opinion is entitled to be given more weight that [sic] the opinion of Dr. Woodward. In particular, the record shows that, unlike Dr. Woodward, Dr. Wickler examined the claimant's right shoulder on numerous occasions both before and after the claimant's work injury and that Dr. Wickler also twice performed surgery on the claimant's injured shoulder. In addition, Dr. Wickler's opinion is entitled to greater weight because it is consistent with the portion of the report of the May 12, 2004 MRI indicating that there was evidence of "partial tearing or fraying at the tendinous insertion." CX 3 at 14.

3. Extent of the Employer's Liability for Medical Expenses

Under section 7 of the Act an employer is required to furnish an injured employee such medical treatment as is reasonable and necessary. A claimant establishes a *prima facie* case that medical care is compensable if the evidence shows that a licensed physician has indicated that the treatment is necessary for a work-related condition. *See Turner v. Chesapeake & Potomac Telephone Company*, 16 BRBS 255 (1984). If an employee's request for necessary treatment is denied or neglected by an employer, the employee is entitled to procure the treatment at the employer's expense. *See Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). In addition, the Court

of Appeals for the Ninth Circuit has held that "when an injured employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable, it is for the patient, not the employer or the [administrative law judge] to decide what is best for him." *Amos v. Director, OWCP*, 153 F.3d 1051, 1052 (9th Cir. 1998).

In this case, there is a dispute concerning the employer's obligation to pay a total of $26,519.00 in unpaid charges for the cervical fusion surgery performed by Dr. Kralick on January 30, 2004. CX 28 at 280, Tr. at 41-44. In this regard, the claimant set forth a *prima facie* case that his cervical surgery is compensable by presenting the medical records showing that this surgery was recommended by Dr. Kralick. In contrast, the defendants contend that even if there was a causal connection between the claimant's work injury and his cervical condition, they are not obligated to pay the costs of the surgery because it was unnecessary for treatment of the claimant's cervical injury. As support for this contention, the defendants rely on the April 4, 2003 report of Dr. Waller and on the report and testimony of Dr. Woodward. After considering the foregoing medical evidence, it has been determined that the defendants are liable for the full cost of the claimant's cervical surgery. There are two reasons for this conclusion.

First, even if there is evidence that Dr. Waller and Dr. Woodward would not have recommended the surgery performed by Dr. Kralick, such evidence by itself would still be insufficient to meet the burden

imposed on defendants in the *Amos* decision. As the decision in *Amos* clearly holds, when a treating physician believes that a particular treatment would help a patient, an employer that is opposed to providing the treatment must provide more than a showing that other physicians would not have recommended the treatment. Rather, under the holding in the *Amos* decision, an employer is obligated to pay for any treatment recommended by a treating physician unless the employer can affirmatively show that the proposed treatment is in fact "unreasonable." *See* 153 F.3d at 1054. Hence, even if, as alleged, there is evidence that Dr. Waller and Dr. Woodward would not have recommended fusion surgery to treat the claimant's cervical injury, such evidence would still be insufficient to show that the claimant was not entitled to such surgery.

Second, there is no evidence that either Dr. Waller or Dr. Woodward believed that the surgery performed by Dr. Kralick was unreasonable. Rather, Dr. Waller simply opined that in the absence of a left-sided radiculopathy there was only a "50/50 chance" that the surgery would help the claimant. Such an opinion is plainly not the same as an opinion that the proposed surgery was "unreasonable." Likewise, Dr. Woodward opined only that there was no causal connection between the claimant's cervical condition and his work injury. EX 2, EX 16. He did not, however, offer any opinion on whether the surgery was an unreasonable treatment for that condition. Indeed, when questioned about whether the claimant's cervical fusion was reasonable, Dr. Woodward

twice asserted that the claimant's February 24, 2002 fall did not cause any injury to his cervical spine before finally acknowledging the reasonableness of the surgery by admitting that the claimant "may have required treatment for arthritis of the neck unrelated to the fall." EX 16 at 27, 52.

4. Average Weekly Wage

Subsections 10(a), 10(b), and 10(c) of the Longshore Act set forth three alternative methods for determining an injured worker's average weekly wage. Subsection 10(a) applies when an injured worker worked in the same employment for "substantially the whole of the year" immediately preceding his or her injury. If subsection 10(a) applies, the average weekly wage for a five-day a week worker is based on the worker's average daily wage, which is then multiplied by 260 and divided by 52. Subsection 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of "similarly situated" employees who did work substantially the whole of the year. If subsection 10(b) applies, the average weekly wage of an injured five-day a week worker is based on the average daily wage of the similarly situated employees, which is then multiplied by 260 and divided by 52. When neither subsection 10(a) or 10(b) can "reasonably and fairly be applied," subsection 10(c) provides the general method for determining the appropriate average weekly wage. Although subsection 10(c) does not set forth any specific formula, it requires calculation of an

amount that "shall reasonably represent the annual earning capacity of the injured employee." In that regard, subsection 10(c) further specifies that consideration must be given to the injured worker's previous earnings in the employment at the time of injury, the earnings of other workers of the same or most similar class in the same employment, and any "other" employment of the injured worker, "including the reasonable value of the services" of any injured worker who was engaged in "self employment." Administrative law judges have broad discretion in determining an injured worker's annual earning capacity under the provisions of subsection 10(c). *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). In addition, in appropriate cases an administrative law judge may base an average weekly wage calculation on an injured worker's earnings over a period of more than one year. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Walker v. Washington Metropolitan Transit Authority*, 793 F.2d 319, 322 (D.C. Cir. 1986); *Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979).

In this case, the claimant worked approximately 26 of the 52 weeks preceding his February 24, 2002 work injury.[6] EX 11 at 258-59. For this reason, the

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[6] A summary of the claimant's earnings during the 52 week period prior to his work injury indicates that he was on vacation for approximately 12 weeks during April, May, June, July, and August of 2001 and also missed approximately 14 more weeks of work for medical reasons following his right shoulder surgery on October 31, 2001. EX 11 at 258-59.

claimant's average weekly wage cannot be calculated under subsection 10(a). *See Matulic v. Director, OWCP*, 154 F.3d 1288 (9th Cir. 1998). Likewise, subsection 10(b) cannot be applied because there is no evidence in the record concerning the wages of similarly situated workers. As a result, all the parties appear to agree that the claimant's average weekly wage must be established under the provisions of subsection 10(c).

The claimant contends that his average weekly wage should be calculated by dividing the $108,416.45 he earned in the 52 weeks prior to his injury by 38 – the number of weeks he was not medically disabled from working. As support for this method of calculation, which produces an average weekly wage of $2,853.08, the claimant relies on the Benefits Review Board's decision in *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). In contrast, the defendants argue that because work opportunities for gatehouse dispatchers declined after the claimant's work injury, his average weekly wage should be based on his average earnings in the five-year period prior to his injury. Under this formula, the claimant's average weekly wage would be $1,757.32.

After considering the arguments of the parties, it has been determined that the defendants' proposed formula would not accurately reflect the claimant's true earning capacity at the time of his injury and that the claimant's average weekly wage should instead be calculated in the manner advocated by the

claimant. The reasons for this determination are as follows.

First, there is no support in the case law or in logic for the employer's suggestion that the alleged post-injury decline in work opportunities for gatehouse dispatchers justifies basing the claimant's average weekly wage on an average of his earning during the five years preceding his work injury. Indeed, the defendants' suggestion that the claimant's average weekly wage should be reduced because of a post-injury decline in work opportunities for gatehouse dispatchers is directly contrary with the Benefits Review Board's recent holding in *Proffitt v. Service Employers International, Inc.*, BRB No. 06-0306 (2006), that "post-injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of a claimant's average weekly wage." Slip opinion at 8. Moreover, even if it were permissible to consider post-injury work opportunities in calculating an average weekly wage, there has been no showing that there is any logical connection between the decline in work opportunities for gatehouse dispatchers and the claimant's wages in the five years prior to his work injury.

Second, it is well settled that average weekly wage calculations under the provisions of subsection 10(c) should not include periods that a claimant was unable to work due to an illness or injury. *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, 219 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Brien v. Precision*

Valve/Bayley Marine, 23 BRBS 207, 211 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 186 (1984) (claimant lost time from work due to an automobile accident); *Richardson v. Safeway Stores*, 14 BRBS 855, 860 (1982) (claimant missed work due to a gall bladder operation).

5. Date of Maximum Medical Improvement

A disability is considered to be permanent on the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown*

v. Bethlehem Steel Corp., 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

When considering medical issues in the Ninth Circuit, a treating physician's opinion is entitled to be given "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998). In addition, clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the administrative law judge's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

In this case, the claimant contends that his condition did not become permanent and stationary

until July 12, 2005, which is the date of maximum medical improvement identified by Dr. Wickler. CX 3 at 5. In contrast, the employer contends that the date of maximum medical improvement is no later than May 24, 2002, based on Dr. Woodward's testimony that the claimant's only injury was an AC joint sprain that would have been expected to fully resolve within three months. Tr. at 39.

It has been concluded that the appropriate date of maximum medical improvement is July 12, 2005, as determined by Dr. Wickler. There are two reasons for this conclusion.

First, Dr. Woodward's opinion that the claimant's condition reached maximum medical improvement in May of 2002 is based on his assertion that the claimant's work injury did not require any kind of surgical treatment. As previously determined, that opinion incorrect and the claimant actually needed surgery on both his neck and his shoulder.

Second, as the physician who had been treating the claimant since 2001, Dr. Wickler had a much greater knowledge of the claimant's medical condition than Dr. Woodward, who examined the claimant on only one occasion. It is also noted that unlike Dr. Woodward's opinion, Dr. Wickler's opinion is consistent with the opinions of the claimant's other medical care providers.

6. Extent of Entitlement to Disability Benefits

In cases involving disputes over an injured worker's entitlement to disability benefits, the burden is initially on the claimant to show that he or she cannot return to his or her regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, he or she is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternative employment for the claimant in the geographical area where the claimant resides or was injured. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing the availability of suitable alternative employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee*, *supra*, at 1330. In deciding whether a particular job constitutes suitable alternative employment, a fact finder must consider the claimant's physical ability and skills, as well as the likelihood that a person of the claimant's age, education, and background would be hired if he or she diligently sought the possible job identified by the employer. *Hairston*, *supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he or she diligently tried to obtain such work, but was

unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991). Under *Stevens*, *supra*, an injured worker that is unable to return to his or her old job is entitled to receive total disability benefits until the date that suitable alternative employment becomes available, even if maximum medical improvement occurs earlier. *Stevens*, 909 F.2d at 1258. Moreover, when determining the date of availability of suitable alternative employment, it is permissible to rely on vocational evidence that indicates that particular suitable jobs were available to a claimant prior to the time that a vocational witness conducted a job market survey. *Id.*

A. Extent of Entitlement to Temporary Disability Benefits

The parties agree that the defendants paid temporary total disability benefits to the claimant from March 11, 2002 until July 15, 2003 at the rate of $933.82 per week and that the payment of temporary total disability benefits at the same rate was resumed from September 1, 2003 until May 17, 2005. The claimant contends that he should have also been paid total temporary disability benefits from July 16, 2003 to August 31, 2004 and from May 18 until July 12, 2005. In addition, the claimant contends that all payments should have been at the rate of $966.08 per week, which is the maximum compensation rate in effect for injuries occurring between October 1, 2001 and September 30, 2002. In contrast, the defendants

contend that no temporary total disability benefits were due after May 24, 2002 and that they are entitled to a credit for payments after that date. Alternatively, the defendants argue that the claimant should be bound by his stipulation that he was able to perform the physical requirements of his Dutch Harbor gatehouse dispatcher position as of March 10, 2004.

It has been concluded that the claimant was temporarily totally disabled during the entire period from March 11, 2002 until July 12, 2005, and was entitled to receive temporary total disability benefits during that entire period at a rate of $966.08 per week. There are three reasons for this conclusion.

First, the contention that the claimant is not entitled to temporary total disability benefits after May 24, 2002 is based on the argument that the claimant reached the point of maximum medical improvement on that date and did not suffer any work-related injuries that required surgery. As previously explained, those arguments are unpersuasive.

Second, although the claimant did in fact informally stipulate that he was physically capable of returning to work as gatehouse dispatcher on March 10, 2004, such a stipulation is not equivalent to a stipulation that such employment was available to him at that time. In fact, the evidence shows just the contrary: that the employer [sic] would not have been allowed to return to work as a gatehouse dispatcher on March 10, 2004 because he did not have a full, unconditional medical release on that date or on any

subsequent date. Moreover, although the Ninth Circuit's decision in *Stevens* would have permitted the defendants to show that some other kind of employment was available to the claimant before the date his condition became permanent and stationary, the defendants have not presented any evidence that such alternative employment was in fact available to the claimant.

Third, although the defendants' post-trial brief acknowledges that the claimant contends that his temporary total disability benefits should have been paid at the rate of $966.08 per week, the defendants have completely failed to dispute that contention. Indeed, it is clear that because the claimant's work injury occurred in February of 2002, he was entitled to benefits at the maximum rate for injuries occurring at that time: $966.08 per week.

B. Extent of Entitlement to Permanent Disability Benefits

The claimant contends that his permanent impairments preclude him from returning to work as a gatehouse dispatcher. In addition, he further contends that he has a residual earning capacity of no more than $473 per week. As proof of this contention, he has submitted into evidence testimony and a report from vocational expert Katherine Reid. Tr. 363-407, CX 8. According to Ms. Reid, her analysis of the claimant's transferable skills and educational background indicates that he has a residual earning

capacity of $11.82 an hour or $473 a week in the Anchorage labor market. CX 8 at 276, Tr. at 372-73.

In contrast, the defendants decline to concede that the claimant cannot return to work as a gatehouse dispatcher. In addition, the defendants argue that even if the claimant cannot be re-employed as a gatehouse dispatcher, he could still obtain work performing other types of longshoring jobs in Dutch Harbor, such as gang boss, dock checker, walking boss, or union hall dispatcher, and thereby earn as much or more than he earned as a gatehouse dispatcher. Tr. at 339-42 (testimony of Ms. Jacobsen), EX 38 at 576 (December 31, 2005 letter from Mr. Lynch). Finally, the defendants assert that if the claimant were to remain in Anchorage, he would have the ability to earn $15 to $20 an hour ($600 to $800 per week). As proof of this contention, the defendants rely on reports prepared by their vocational expert, Carol Jacobsen. EX 39, Tr. at 316-17.

For the following reasons, it has been concluded that the claimant cannot return to work as a gatehouse dispatcher and that he has had a residual earning capacity of $720 per week since October 10, 2005.

First, the fact that Mr. Lynch relied on the claimant's inability to provide a full medical release as grounds for refusing to re-hire him as a gatehouse dispatcher is by itself sufficient to establish that the claimant's work injury and residual impairments preclude him from returning to his former job.

Second, there is insufficient proof that the claimant would be eligible to seek other kinds of longshore jobs in Dutch Harbor and an absence of any reliable evidence indicating how much he could reasonably expect to earn, if he were in fact eligible to seek such jobs. In this regard, it is recognized that Mr. Lynch has speculated that the claimant might be able to find employment in Dutch Harbor as a gang boss, dock checker, or walking boss, and thereby work as many as 1400 to 1700 hours a year. However, Mr. Lynch's opinion on this subject does not appear to be well founded. As he admits in his letter of December 31, 2005, his belief that the claimant might be employed in other longshoring jobs is based entirely on a presumption that the claimant's union and other Dutch Harbor employers will agree to waive a general requirement precluding the employment of workers who have permanent work restrictions. EX 38 at 576. In view of the fact that Mr. Lynch himself refused to waive the full-release requirement when the claimant sought re-employment as a gatehouse dispatcher, it seems unreasonable to assume that other employers in Dutch Harbor would make a different decision. Moreover, there has been no showing that Mr. Lynch has the kind of expertise that would enable him to make credible estimates of the number of hours that the claimant might be able to work if the full-release requirement were waived. Although Mr. Lynch does manage one of the marine terminals in Dutch Harbor, there has been no showing that he has the kind of familiarity with union dispatching practices that would be needed in order to accurately predict how

many hours of work might be available to a longshoreman who was limited to taking only certain kinds of longshore jobs. Indeed, other evidence credibly suggests that the claimant's opportunities for obtaining these alternative jobs would be limited.[7]

Third, although Ms. Reid has opined that her labor market survey indicates that the claimant is unlikely to be able to earn more than $473 a week, the labor market survey conducted by Ms. Jacobsen was more extensive and was successful in identifying at least one job in the Anchorage area that is particularly suitable for the claimant. That job, which is listed on page 15 of Ms. Jacobsen's labor market survey, is for a shipping order/customer clerk at CSX/Horizon Lines' Anchorage office and pays at least $720 per week. Although the job requires some lifting up to 35 pounds, Ms. Jacobsen noted that

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[7] According to the testimony of the claimant and Dan Kondak, a longshore worker who once worked as the hiring hall dispatcher in Dutch Harbor, dock checker jobs are assigned by rotation and "A card" union members like the claimant can obtain dock checker jobs only two or three times a week during the busy season and not at all during the slow season. Tr. at 146-49 (claimant's testimony), Tr. at 232-33 (testimony of Dan Kondak), Tr. at 374-77, 387-88 (testimony of Ms. Reid). In addition, there is evidence that the claimant's physical limitations would preclude him from performing all the duties of a gang boss or walking boss. Tr. at 143 (claimant's testimony), Tr. at 233-34 (testimony of Dan Kondak). Likewise, both the claimant and Mr. Kondak also testified that the union dispatcher job suggested by Mr. Lynch is an elective position and that it is questionable whether he could win an election for that job. Tr. at 149-51 (claimant's testimony), Tr. at 234-35 (testimony of Dan Kondak).

assistance in such lifting is available. It is therefore concluded that the job is compatible within the claimant's prior work experience and within the "light to medium" work restrictions recommended by Dr. Kralick and Dr. Wickler. Ms. Jacobsen's report indicates that such a shipping order/customer clerk job was last open 60 days prior to her report of December 8, 2005. Accordingly, it has been determined that this alternative employment was available to the claimant on October 10, 2005.

The difference between the claimant's average weekly wage of $2,853.08 and his residual earning capacity of $720 per week is $2,133.08. Accordingly, beginning on October 10, 2005 he became entitled to permanent partial disability benefits at a rate of $966.08 – the maximum rate for injuries occurring between October 1, 2001 and September 30, 2002.

ORDER

1. The defendants shall pay the claimant temporary total disability benefits for the period from March 11, 2002 to July 11, 2005, inclusive, at a compensation rate of $966.08 per week.

2. The defendants shall pay the claimant permanent total disability benefits for the period from July 12, 2005 to October 9, 2005, inclusive, at a compensation rate of $966.08 per week, plus any increases required under section 6 of the Longshore Act.

3. Beginning on October 10, 2005 and until ordered otherwise, the defendants shall pay the claimant permanent partial disability benefits at a compensation rate of $966.08 per week.

4. The defendants shall receive credit for any compensation benefits paid to the claimant since March 11, 2002.

5. The defendants shall pay interest on each unpaid installment of compensation from the date the compensation became due at rates to be determined by the District Director.

6. The District Director shall make all calculations necessary to carry out this order.

7. The defendants shall provide all reasonable and necessary medical care for the treatment of the claimant's cervical and right shoulder injuries sustained on February 24, 2002, including all costs related to the cervical surgery performed by Dr. Kralick on January 30, 2004.

8. Within 20 days after this Decision and Order becomes final, the counsel for the claimant shall submit a fully supported and updated application for costs and fees to the undersigned Administrative Law Judge and to the counsel for the defendants. Within 10 days thereafter, the counsel for the defendants shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 10 days after receipt of such objections, the claimant's counsel shall

verbally discuss each of the objections with the counsel for the defendants. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within 10 days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 10 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for the defendants. The counsel for the defendants shall have 10 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by this Administrative Law Judge.

[Signature Omitted]
Paul A. Mapes
Administrative Law Judge

San Francisco, California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANA ROBERTS,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS; SEA-LAND SERVICES, INC.,

Respondents,

KEMPER INSURANCE COMPANIES,

Real Party in Interest.

No. 08-70268

OWCP No. BRB No. 07-0382
Northern District of California, San Francisco

ORDER

(Filed Feb. 10, 2011)

Before: O'SCANNLAIN and N.R. SMITH, Circuit Judges, and WHYTE, Senior District Judge.*

The panel denies the petition for panel rehearing and denies the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for Northern California, San Jose, sitting by designation.

The petition for rehearing and the petition for rehearing en banc are DENIED.

OPPOSITION BRIEF

No. 10-1399

In the Supreme Court of the United States

DANA ROBERTS, PETITIONER

v.

SEA-LAND SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, disabled maritime workers are paid compensation based on their average weekly wage at the time of their disabling injury. See 33 U.S.C. 908, 910. Such compensation is capped, however, at twice the "applicable" fiscal year's national average weekly wage. 33 U.S.C. 906(b)(1). The Secretary of Labor determines the national average wage for each fiscal year, and that determination applies "to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." 33 U.S.C. 906(c). The question presented is whether the "applicable" Secretarial determination is the national average wage for the year during which an employee suffers a disabling injury or for the year during which a formal compensation order is issued.

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In the Supreme Court of the United States

No. 10-1399

DANA ROBERTS, PETITIONER

v.

SEA-LAND SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 625 F.3d 1204. The decisions of the Benefits Review Board of the United States Department of Labor (Pet. App. 14-27) and the administrative law judge (Pet. App. 33-109) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2010. A petition for rehearing was denied on February 10, 2011 (Pet. App. 110-111). The petition for a writ of certiorari was filed on May 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. 901 *et seq.*, establishes a federal workers' compensation system for employees disabled or killed in the course of covered maritime employment. See 33 U.S.C. 908, 909, 903(a). Disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury[,]" 33 U.S.C. 902(10), is "in essence an economic, not a medical, concept." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). Accordingly, "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." 33 U.S.C. 910. A totally disabled worker's basic compensation rate is two-thirds of that average weekly wage. 33 U.S.C. 908.[1]

At the same time, the Act has always placed an upper limit on weekly compensation, irrespective of the worker's average weekly wage. From 1927 to 1972, this maximum rate was a fixed sum ranging from $25 to $70 per week. See 33 U.S.C. 906(b) (Supp. I 1928); 33 U.S.C.

[1] Partially disabled employees, who are able to work after their injuries at a diminished wage, are typically entitled to two-thirds of the difference between their pre-disability average weekly wage and their "residual earning capacity" (*i.e.*, the wages they earn or could earn through suitable alternative employment). See 33 U.S.C. 908(c)(21). Disabilities under the Act are also characterized as "temporary" or "permanent." A disability is "temporary" if the claimant's medical condition is improving and becomes "permanent" when the claimant reaches maximum medical improvement. See 33 U.S.C. 908(a)-(e); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). As happened in this case, a claimant's disability status can change even after it becomes "permanent" if, for example, suitable alternate employment is later identified.

906(b) (1970). The statute now sets the maximum compensation rate at 200% of the "applicable national average weekly wage." 33 U.S.C. 906(b)(1). The national average weekly wage is determined by the Secretary of Labor each year, and applies from October 1 of that year until September 30 of the next. 33 U.S.C. 906(b)(3).[2]

The statute provides that the Secretary's determination of the national average weekly wage for a particular year "shall apply to employees or survivors [1] *currently receiving* compensation for permanent total disability or death benefits during such period" and [2] "those *newly awarded* compensation during such period." 33 U.S.C. 906(c) (emphases added). The dispute in this case centers on the meaning of this provision's "newly awarded" and "currently receiving" clauses.

2. On February 24, 2002, petitioner was injured while working for respondent Sea-Land Services, Inc. (Sea-Land), in Dutch Harbor, Alaska. Pet. App. 34, 37. He sought medical treatment two days later, but continued working until March 11, 2002. *Id.* at 37-38. Sea-Land's insurer, respondent Kemper Insurance Company (Kemper), voluntarily paid petitioner compensation for temporary total disability for various periods before May 18, 2005. *Id.* at 101; see 33 U.S.C. 914(a) ("Compensation under this [Act] shall be paid periodically, promptly, and * * * without an award, except where liability to pay compensation is controverted by the employer."). Kemper ceased payments on that date, and the matter was referred to an administrative law judge (ALJ) for a hearing in January 2006. Pet. App. 34.

3. a. In October 2006, the ALJ found that petitioner had suffered a disabling injury in the course of his mari-

[2] This one-year "period," see 33 U.S.C. 906(c), is referred to in this brief as a fiscal year (FY).

time employment and was entitled to Longshore Act benefits. Petitioner was awarded compensation for temporary total disability from the date he became disabled (March 11, 2002) until his condition reached maximum medical improvement (July 11, 2005). Pet. App. 107. The ALJ found that Sea-Land had proven that suitable, albeit lower-paying, alternative employment was reasonably available to petitioner beginning on October 10, 2005. *Id.* at 104-107. As a result, petitioner was awarded compensation for permanent total disability from July 12, 2005 to October 9, 2005 and for permanent partial disability from October 10, 2005 until ordered otherwise. *Id.* at 107-108.

The ALJ determined that petitioner's average weekly wage at the time of his injury was $2,853.08, and that his residual earning capacity after October 10, 2005 was $720 per week. Pet. App. 95-96, 107; see 33 U.S.C. 910. Based on that average weekly wage, petitioner's basic compensation rates were: $1,902.05 for his periods of total disability ($2,853.08 x 2/3); and $1,422.05 for his periods of partial disability (($2,853.08 - $720.00) x 2/3). See 33 U.S.C. 908.

Both of these compensation rates exceeded $966.08 per week, the maximum rate in effect for the year in which petitioner was injured (FY 2002). The ALJ found that petitioner was limited to that maximum rate for all periods of temporary total and permanent partial disability. Pet. App. 107-108. For periods of permanent total disability, petitioner was entitled to that same rate, "plus any increases required under Section 6 of the Longshore Act." *Id.* at 107.[3] The ALJ also ordered Sea-

[3] The ALJ was apparently referring to the statute's "currently receiving" clause, which applies a new fiscal year's national average wage

Land to "pay interest on each unpaid installment of compensation from the date the compensation became due." *Id.* at 108. The ALJ ordered the district director to make the calculations necessary to implement the award. *Ibid.*[4]

b. Petitioner sought reconsideration, arguing, inter alia, that he was entitled to the FY 2007 maximum rate of $1,114.44 because the ALJ issued the compensation order in that year. Pet. 6. In a supplemental memorandum, however, petitioner conceded that the ALJ's application of the FY 2002 maximum rate was correct under binding precedent of the Department of Labor's Benefits Review Board (Board), *Reposky* v. *International Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (Oct. 20, 2006), which was issued after the ALJ's initial decision. Pet. App. 29.

In *Reposky*, the Board held that a claimant is "newly awarded" compensation for purposes of Section 906(c) "when benefits commence, generally at the time of injury." 40 Ben. Rev. Bd. Serv. (MB) at 74. Accordingly, benefits are initially limited to the maximum rate in effect on the date the claimant became disabled, rather than the rate in effect when a compensation order is issued. *Id.* at 74-76. Basing the pertinent maximum

to claimants "currently receiving compensation for permanent total disability or death benefits during such period." 33 U.S.C. 906(c).

[4] District directors are officials of the Office of Workers' Compensation Programs responsible for the day-to-day administration of the Act, including attempts to informally resolve disputes. Because ALJ awards are not effective until filed by a district director, 33 U.S.C. 921(a), district directors are frequently charged with the responsibility to calculate compensation amounts due under ALJ decisions. The statute uses the term "deputy commissioner" rather than "district director," but the authority of the position remains unchanged. 20 C.F.R. 701.301(a)(7) (2006); see also 55 Fed. Reg. 28,606 (1990) (original promulgation).

rate on the date the worker's disability commences, the Board held, "maintains consistency in the statute and yields rational results." *Id.* at 76.

The ALJ agreed that *Reposky* controlled, and consequently denied the motion for reconsideration. Pet. App. 28-32. He nonetheless found that the district director had erred in calculating the maximum rate payable to petitioner for his permanent total disability from October 1 to 9, 2005. He found that, for those nine days, petitioner was "currently receiving compensation for permanent total disability," and was thus entitled to the FY 2006 maximum rate of $1,073.64 per week, rather than the FY 2002 maximum rate of $966.08 per week. *Id.* at 31.

4. Both petitioner and Sea-Land appealed the ALJ's decision to the Board, which affirmed in all respects. Pet. App. 14-27. The Board, relying on *Reposky*, rejected petitioner's argument that he was entitled to the FY 2007 maximum compensation rate because the ALJ's order was issued during that fiscal year.[5] *Id.* at 19-20.

5. The court of appeals affirmed in relevant part. Pet. App. 1-13. It held that an employee is "newly awarded" compensation when he first becomes disabled. Reading Section 906(c) "with a view to [its] place in the overall statutory scheme," the court of appeals concluded that its interpretation of that provision "accords with the structure of the [Longshore Act], which identi-

[5] Petitioner also argued that, even while receiving compensation for temporary total or permanent partial disability, he should have been subject to a new, higher maximum rate at the beginning of each fiscal year. The Board, noting that Section 906(c) provides for annual changes to the maximum rates payable only for permanent total disability or death, 33 U.S.C. 906(c), rejected that argument, and petitioner did not raise it before the court of appeals. See Pet. App. 20.

fies the time of injury as the appropriate marker for other calculations relating to compensation," including determinations under Section 910 of the employee's average weekly wage—"the starting point for determining compensation," and his residual earning capacity under Section 908(c)(21). *Id.* at 8 (internal citation omitted) (first set of brackets in original). "To apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled," the court of appeals explained, "would be to depart from the Act's pattern of basing calculations on the time of injury." *Id.* at 8-9.

The court rejected petitioner's argument that the term "award" in Section 906(c) could mean only "compensation order," citing several other provisions of the Act in which that term "refer[s] to an employee's entitlement to compensation under the Act, even in the absence of a formal order." Pet. App. 6-8 (citing 33 U.S.C. 908(c)(22) (defining the "award" for loss of specified body parts), 908(c)(20) (requiring compensation to be "awarded" for disfigurement), 910(h)(1) (using "awarded compensation" and "entitled" to compensation to mean the same thing), 933(b) (defining "award," for purposes of that subsection only, as a compensation order)).

The court of appeals also rejected petitioner's argument that the Fifth Circuit's decision in *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (1997), should lead to a different interpretation of Section 906(c). The court of appeals acknowledged language in *Wilkerson* that appeared to support petitioner's interpretation of the Act, but pointed out that the Fifth Circuit "did not engage in any analysis of the text of the [Longshore Act]," and did not "explain how its interpretation accords with the overall statutory scheme." Pet. App. 9.

Given the absence of reasoning in *Wilkerson*, the court of appeals found "nothing in the opinion that persuade[d] [it] to abandon [its] holding here." *Ibid.*

The court of appeals interpreted Section 906(c)'s "currently receiving" clause consistently with its "newly awarded" clause. Pet. App. 10-12. Noting that "the Act expects employees entitled to compensation to receive payment during their period of disability," *id.* at 11, the court "construe[d] [Section 906(c)'s] reference to the period 'during' which an employee is 'currently receiving compensation for permanent total disability' to mean the period during which an employee is *entitled* to receive such compensation, regardless of whether his employer actually pays it." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court. Although there is tension between the decision below and a prior decision of the Fifth Circuit, this Court's intervention is not warranted at this time. It is not clear that the Fifth Circuit would disagree with the court of appeals' reasoning here, and additional cases presenting this question are pending in the lower courts. Further percolation on the question is thus warranted.

1. a. Petitioner argues that the decision below conflicts with the language of Section 906(c)'s "newly awarded" clause. Specifically, he argues that the term "award" in the provision means "compensation order." Pet. 13-19. He thus contends that the phrase "newly awarded" in Section 906(c) must mean newly issued a compensation order. Since the first formal compensation order in this case—the ALJ's October 2006 decision—was issued in the 2007 fiscal year, petitioner ar-

gues that all compensation awarded should be paid at the FY 2007 maximum compensation rate. He is incorrect.

As the court of appeals noted, the Act does not define either "award" or "awarded." Pet. App. 6. Although the Act does, in places, use "award" to mean "compensation order," it does not do so uniformly. To the contrary, the court of appeals cited several examples from Sections 908 and 910 of the Act in which Congress "use[d] the terms 'award' and 'awarded' to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order." *Id.* at 6-7 (citing 33 U.S.C. 908(c)(20) ("compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck"), 908(c)(22) ("the award of compensation" for loss of multiple body parts "shall be for * * * each such member or part * * * which awards shall run consecutively"), 910(h)(1) (increasing the average weekly wage for claimants "awarded compensation as the result of death or permanent total disability [prior to the 1972 amendment] at less than the maximum rate that was provided in this [Act] at the time of the injury")). The court of appeals correctly concluded that, "[b]y use of the term 'awarded'" in these subsections, "Congress could not have meant 'assigned by formal order in the course of adjudication,' given that employers are obligated to pay such compensation regardless of whether an employee files an administrative claim." *Id.* at 6; see 33 U.S.C. 914(a) ("Compensation under this [Act] shall be paid * * * without an award, except where liability to pay compensation is controverted by the employer.").

The court of appeals found further support for the proposition that the Longshore Act does not always use "award" to mean formal order in Section 933(b), which

provides that, "*[f]or the purpose of this subsection*, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board." Pet. App. 8 (citing 33 U.S.C. 933(b) (emphasis added). The court correctly noted that Section 933(b)'s subsection-specific definition of "award" as a "formal order" would not be necessary "[u]nless 'award' is used in other sections to mean something broader than a formal compensation order." *Id.* at 8.

Petitioner contends that Section 919(e), which provides rules governing the filing and service of formal compensation orders, undermines the court of appeals' reasoning. Pet. 17. That provision states that "[t]he order rejecting the claim or making the award (referred to in this [Act] as a compensation order) shall be filed in the office of the [district director]" and mailed to the parties. 33 U.S.C. 919(e). That provision unsurprisingly equates an "*order* * * * making the award" with a "compensation order." *Ibid.* (emphasis added). Section 906(c), by contrast, does not use the word "order"; it instead addresses "newly awarded compensation." 33 U.S.C. 906(c).

As the court of appeals correctly held, determining whether a given provision's reference to "award" means "compensation order" or something else depends on the statutory context of that provision. The court accordingly read Section 906(c) "with a view to [its] place in the overall statutory scheme." Pet. App. 8 (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (brackets in original). Section 906 should be read consistently with Sections 908 and 910 because those are the sections that govern an employee's compensation rate before it is capped by Section 906. And

those provisions clearly establish that it is the time of injury, not the time of the compensation order, that controls benefit levels. See 33 U.S.C. 908(a) (compensation for permanent total disability set at two-thirds of "the average weekly wages"); 33 U.S.C. 910 ("[T]he average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation.") (emphasis added). There is no reason to conclude that Congress would have wanted an employee's average weekly wage to be calculated at the time of the injury, but to have it capped based on a "national average weekly wage" from years later. See Pet. App. 8 ("[T]he structure of the [Longshore Act] * * * identifies the time of injury as the appropriate marker for other calculations relating to compensation.").[6]

[6] The Board reached the same result by focusing on Section 906(c)'s use of the term "during," rather than the term "awarded." The Board accepted the interpretation offered by the Director, Office of Workers' Compensation Programs, that the phrase, "newly awarded compensation during such period," 33 U.S.C. 906(c), means "newly awarded compensation *for* such period," rather than petitioner's preferred interpretation, "newly awarded compensation *in* such period." *Reposky* v. *International Transp. Serv.*, 40 Ben. Rev. Bd. Serv. (MB) 65, 76 (Oct. 20, 2006), cited in Pet. App. 18-20. Because an employee's compensation, regardless of when formally ordered, is always paid for the period of disability, the maximum rate on the date of that disability should control. One need look no further than Section 908 for an example of Congress's use of "during" as a functional equivalent for "for." That section provides, in numerous places, that compensation is to be paid "during the continuance of" the relevant disability. 33 U.S.C. 908(a), (b), (c)(21), (23) and (e). This clearly does not mean, however, that compensation must be paid, or may be paid only, *in* the actual period of disability. Rather, it means that compensation is payable *for* the period of disability. That the compensation may be formally ordered at some date after the period of disability does not change the rate at which it is paid.

Petitioner's interpretation of Section 906(c) would produce an array of impractical and inequitable results. Most obviously, it would render Section 906(c) impossible to apply in most Longshore Act cases, in which the employer voluntarily pays compensation, and no formal order is ever issued. See 33 U.S.C. 914(a) and (b). Under petitioner's reading of Section 906(c), such employees would *never* be "newly awarded compensation" (because they have no formal order of compensation), so the Act would be strangely silent on the question of which national average weekly wage would apply to them.

Petitioner's interpretation would also result in otherwise-identically situated claimants—workers who suffer the same injury on the same day, and incur the same disability that prevents them from earning the same wages during the same time period—being compensated at different rates based only on the happenstance of when, or if, each receives a formal compensation order. See Pet. App. 9 n.1. Petitioner argues that such varying benefit rates are necessary to compensate claimants for their delayed receipt of benefits. Pet. 23. But compensation can be delayed in any case, not just the relatively few involving the maximum rate, making Section 906(c) a poor vehicle to remedy that problem.[7]

[7] The statute, as interpreted by petitioner, would also provide an overly broad remedy for delay because it would apply even when there is no delay in payment. If Sea-Land had voluntarily paid petitioner at the FY 2002 maximum rate from the date of his injury through the date of the FY 2007 compensation order, with appropriate increases under the "currently receiving" clause for his three-month period of permanent total disability, petitioner would have experienced no delay in receiving compensation. But under petitioner's interpretation of Section 906(c), he would nevertheless be entitled to the FY 2007 maximum rate—not only going forward but also retroactively to the date he

The Act includes a more direct and traditional response to delay; it provides that all claimants shall be compensated through the payment of interest for the time during which they go without benefits. See, *e.g.*, *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1059 (9th Cir. 1998) (interest accrues from the date benefits became due, not from the date of the ALJ's award); *Quick* v. *Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Indeed, petitioner was awarded interest here. Pet. App. 108.

b. Petitioner argues that the court of appeals also misconstrued Section 906(c)'s "currently receiving" clause, which applies a given fiscal year's maximum rate to employees "currently receiving compensation for permanent total disability * * * during such period." 33 U.S.C. 906(c); Pet. 21-22. The court of appeals held that petitioner is entitled to the FY 2005 maximum rate from July 12, 2005 through September 30, 2005, and the FY 2006 maximum rate from October 1, 2005 to October 9, 2005, because he was entitled to compensation for permanent total disability in that span. Pet. App. 10-13 & n.2. Petitioner argues that his benefits for both periods should be paid at the FY 2007 maximum rate because Sea-Land did not actually pay compensation for those periods until after the ALJ's October 2006 compensation order. Pet. 21-22.

This petition provides a poor vehicle to decide that question. As petitioner was permanently and totally disabled only from July 12, 2005 through October 9, 2005, the currently receiving clause is relevant only to his compensation for that three-month period. Pet. App. 10, 107. As a result, the Court's resolution of this ques-

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became disabled—because the ALJ's compensation order was issued in FY 2007.

tion would result in a total increase of only $830.98 in benefits for petitioner.[8]

In any event, the court of appeals' decision was correct, and petitioner's contrary interpretation is flawed for the same reasons as the interpretation he offers for the "newly awarded" clause: it divorces petitioner's maximum compensation rate from his basic compensation rate, which is directly based on his average weekly wage at the time he became disabled. See 33 U.S.C. 908, 910. As the court of appeals explained, because the Act requires employers to pay compensation during an employee's disability regardless of whether a claim is filed, "section [90]6(c)'s reference to the period 'during' which an employee is 'currently receiving compensation for permanent total disability' * * * mean[s] the period during which an employee is *entitled* to receive such compensation, regardless of whether his employer actually pays it." Pet. App. 11. This interpretation of Section 906(c)'s "currently receiving" clause is consistent with the neighboring "newly awarded" clause and with the Act's overall compensation scheme, which provides that compensation is paid for disability, 33 U.S.C. 908, 902(10), and that compensation for permanent total disability is payable "during the continuance of such total disability." 33 U.S.C. 908(a). Because every other element in the Act's compensation scheme turns on the

[8] The 2005 maximum rate was $1047.16, and it covered 11 and four-sevenths weeks of this period, for a total of $12,117.14. The 2006 maximum rate was $1073.64, and it covered 1 and two-sevenths weeks of this period, for a total of $1380.39. So the total, using those years' maximum rate, was $13,497.53 ($12,117.14 plus $1380.39). If the 2007 maximum rate of $1114.44 had applied to the entire period (12 and six-sevenths weeks), the total would have been $14,328.51. Finally, $14,328.51 minus $13,497.53, is $830.98.

time the employee is disabled, the court of appeals reasonably read both clauses of Section 906(c) the same way.

2. a. Contrary to petitioner's argument, the court of appeals' decision regarding when an employee is "newly awarded" compensation under Section 906(c) does not conflict with this Court's decision in *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992) (*Cowart*).

In *Cowart*, the Court considered the meaning of the phrase "person entitled to compensation" in 33 U.S.C. 933(g). Section 933 allows a "person entitled to compensation" under the Act to pursue claims against third parties responsible for injuries compensable under the Act without forgoing such compensation. See 33 U.S.C. 933(a). Section 933(g), however, provides that if the "person entitled to compensation" settles with a third party for less than the amount of compensation to which he is entitled without first receiving written approval from the liable employer, all future benefits are forfeited. 33 U.S.C. 933(g)(1)-(2). The question before the Court in *Cowart* was whether an injured employee could be a "person entitled to compensation" subject to the forfeiture provision if, at the time the employee entered into the third-party settlement, the employer had not yet paid any compensation voluntarily and was not subject to a compensation order. 505 U.S. at 471. The Court answered that question in the affirmative, holding that the worker was a "person entitled to compensation" as soon as he suffered an injury giving him a right to compensation under the Act, regardless of whether the employer had paid compensation or was subject to a compensation order. *Id.* at 477.

Petitioner argues that the Court's holding should be read as a pronouncement that the term "award" can

never mean entitlement. Pet. 21. But the Court in *Cowart* held only that receiving a formal compensation order is not the only way to become a "person entitled to compensation" for purposes of Section 933(g). In doing so, *Cowart* did not interpret Section 906, nor did it attempt to define the terms "award" or "compensation order," neither of which appears in Section 933(g). The court of appeals' interpretation of Section 906 and the phrase "newly awarded" cannot conflict with a decision that interprets neither.

b. Petitioner argues that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (1997). While *Wilkerson* contains conclusory statements supporting petitioner's interpretation of Section 906(c)'s "newly awarded" clause, the decision provides little support for its conclusion. As the court of appeals explained here, the *Wilkerson* court "did not engage in any analysis of the text of the [Longshore Act]" or "explain how its interpretation [of Section 906(c)'s "newly awarded" clause] accords with the overall statutory scheme," but "resolved the issue summarily without expressing any reasoning." Pet. App. 9. In particular, the Fifth Circuit did not consider: whether "award" could mean something other than "compensation order"; the interplay between Section 906 and the unquestioned time-of-injury requirement in Sections 908 and 910; or the odd results that would flow from a time-of-compensation-order test.

In addition, the context in which the Fifth Circuit considered Section 906 was markedly different from the instant case. When the employee in *Wilkerson* was injured in 1972, the maximum compensation rate was $70 per week because the earlier, fixed-maximum version of

Section 906 was in effect. See 125 F.3d at 905. His disability was not discovered for 20 years, and a compensation order was consequently not entered until 1993, after the current maximum-rate provision became effective.[9] *Id.* at 905-906. Thus, while the only question below was how to interpret the current Section 906(c) (which unquestionably applied in this case), the issue in *Wilkerson* was whether to apply the current version of that provision or the pre-amendment, fixed-maximum version. See *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 75 ("[T]he issue before the court [in *Wilkerson*] was the applicability of the maximum compensation rate under the pre-1972 Act as opposed to the compensation scheme provided by the 1972 Amendments.").

Finally, the Fifth Circuit decided *Wilkerson* without the benefit of the views of the Director of the Office of Workers' Compensation. That court provides *Skidmore* deference to the Director's interpretations of the Longshore Act, with "the amount of deference * * * depend-[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Carey* v. *Ormet Primary Aluminum Corp.*, 627 F.3d 979, 982 (5th Cir. 2010) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)); see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997). With the benefit of the Director's views (and given the different context in which *Wilkerson* arose), it is possible that the Fifth

[9] The gap between those two events is explained by the fact that Wilkerson's injury was hearing loss. For hearing loss, the date of injury is the last day the worker was exposed to injurious noise—in Wilkerson's case, the day he retired in 1972. *Wilkerson*, 125 F.3d at 905 n.3; see 33 U.S.C. 908(c)(13)(D).

Circuit would agree with the court of appeals decision in this case. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (agency interpretation may supersede prior judicial interpretation of statute). The Fifth Circuit may, in fact, have the opportunity to do so in the near future because this question is presented in at least one district court case within its jurisdiction. See *Service Employees Int'l, Inc.* v. *Simons*, No. 4:11-cv-01065 (S.D. Tex. filed Mar. 22, 2011) (seeking review of, *inter alia*, No. 10-0576 (Dep't of Labor Ben. Rev. Bd.) (Jan. 26, 2011), http://www.dol.gov/brb/decisions/lngshore/unpublished/Jan11/10-0576.pdf).

The same question is also currently pending before the Eleventh Circuit in *Boroski* v. *DynCorp International*, No. 11-10033 (oral argument scheduled for July 28, 2011). As in this case, but unlike in *Wilkerson*, the Eleventh Circuit has the benefit of the Director's interpretation of Section 906. It would be appropriate to allow this question to percolate further in the courts of appeals, and intervention by the Court at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2011

REPLY BRIEF

BRIEFS

No. 10-1399

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., and KEMPER INSURANCE CO., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. The Construction of Longshore Act § 6(c) Advanced by Respondent Director, OWCP, Is Inconsistent with the Plain Terms of the Provision.

A. "Newly awarded compensation during" a fiscal year

Petitioner has demonstrated the error of the assertion that "award[ed]" does not have a consistent meaning throughout the Act, Pet. at 14-19. As the court below began by acknowledging, an "award" has a well-established general legal meaning, and also a meaning fixed by the terms of Longshore Act § 19(e), 33 U.S.C. § 919(e). A claimant has not been "awarded" compensation ("newly" or otherwise) if no order making an award has been filed under that provision, just because he is entitled to the compensation in question, or indeed just because he is paid such compensation, as the Act says, "without an award," § 14(a), (e) – a statutory designation inconsistent with the view that a claimant is "awarded" compensation as soon as he or she is *entitled to* it.

Respondent Director, OWCP repeats the argument of the court below that the specificity of the definition of "the term 'award'" "for purposes of" § 33(b) of the Act, introduced by an amendment to that subsection in 1984, 33 U.S.C. § 933(b), "would not be necessary" if "award" already had that meaning throughout the Act. Br. in Opp. 10. The Director presents no response, however, to Petitioner's point that this Court's decision in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983), which intervened

between the introduction and passage of that amendment, showed conclusively that that specificity was *not* necessary because the term already was limited to § 19(e) compensation orders. It should be noted as well – in connection with the Director's claim of "*Skidmore* deference," (Br. in Opp. 17-18) – that the Director's adoption of the court of appeals' view that "awarded" need not be read in § 6(c) of the Act to mean "granted benefits in a compensation order" was in no way a basis for the administrative construction of § 6(c) urged by the Director before the Board in the key decision in *Reposky v. Int'l Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), or before the court of appeals. It is no more than "appellate counsel's *post hoc* rationalization[ ] for agency action" that was based on no such reasoning, to which no judicial deference is due. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). In addition, the Director's purported "construction" of the "currently receiving" clause of § 6(c), advanced before (and accepted by) the Board in *Reposky* and urged to the court of appeals below with partial success, represented a partial departure even from the never-articulated previous administrative *practice* of the OWCP until then. The basis for even *Skidmore* "respect" is at its weakest. But even if that basis were far stronger, the position advanced by the Director is so clearly inconsistent with the terms of the statute that any such "respect" would be insufficient to warrant adoption of the Director's position.

Nowhere in the Act does any form of the word "award" refer to a situation in which the claimant merely has (as subsequently determined) a right to compensation, i.e., suffers from a work-related loss of earning capacity, but has not received an award ordering its payment, in a compensation order filed under § 19(e). It is all the more impossible to regard the claimant whose claim was "controverted," and who was paid nothing "during" the intervening fiscal years between the time of controversion and the time an ALJ's Decision and Order – the § 19(e) "compensation order . . . making the award" – was filed, as having been "newly awarded compensation during" the year of onset.

B. "Illogical and inequitable results" of the statute as written

The Director argues (Br. in Opp. 12) that reading § 6(c) as it is written would "produce an array of impractical and inequitable results," without even attempting to demonstrate that such results are in any way "'demonstrably at odds with the intentions of its drafters' [or] so bizarre that Congress 'could not have intended' it," *Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991). Accordingly, the statute must be applied as written even if it were demonstrated that the effect will be, as in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), harsh and incongruous, or, as in *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979), a departure from the pattern otherwise shown by the Act. If the consequences of the

statutory determinant are unacceptable, the Director is uniquely situated to ask Congress to change it. But the courts lack power to grant such relief.

The attempt to demonstrate "illogical and inequitable" results fails anyway. The Director's assertion (Br. in Opp. 12) that the Act is silent as to the maximum applicable where an employer voluntarily pays compensation because the claimant in such a case "would *never* be 'newly awarded compensation' (because they have no formal order of compensation)," begs the question and interposes a fallacious obstacle. An employer must determine an amount of compensation to pay without an award and will, assumedly, do so by reference to the amount of compensation that would be awarded if an award were entered at the time of such payment. Either party, however, may request the entry of a formal award, and the Act explicitly contemplates – indeed, directs in mandatory terms as a ministerial duty – the entry of compensation orders without any litigation, as long as no disagreement is registered or hearing requested within twenty days after notice of claim.[1] It can

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[1] Section 19(c) of the Act, 33 U.S.C. § 919(c), provides:

> The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, . . . and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of

(Continued on following page)

hardly be subject to question that the duty to issue such orders falls to the OWCP district directors. Although the 1972 amendments assigned hearing authority to ALJs and transferred "all powers, duties, and responsibility vested by this Act in the deputy commissioners with respect to such hearings," (§ 19(d)), the statutory mandate contained in § 19(c) to issue an order where no hearing is ordered because there is no dispute requiring an evidentiary hearing is obviously not a "power[ ], dut[y], or responsibilit[y] with respect to . . . hearings," so it remains the responsibility of the deputy commissioners ("district directors"). The fact that they commonly do not perform that duty does not establish any reason they *can*not, or will not when requested by the employer, promptly enter orders on currently undisputed claims. Once the

---

> the claim. *If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.*

(Emphasis added.) Thus, in the typical serious-injury case in which the employer has reported the claimant's employment-related injury to the district director under § 30(a) of the Act, has acknowledged the resulting temporary total disability and instituted payments without an award, has reported such payment to the district director under § 14(c), and has not suggested that such disability has reached an end within the thirty-day period, an award is to be entered for continuing temporary total disability, without the need for any cessation of the payments without an award, or for any litigation. That continuing award will then be subject to modification, under the same procedures applicable to original claims, under § 22 of the Act. 33 U.S.C. § 922.

effect of § 6(c) is recognized, insurers will need only insist on ministerial entry of orders in such undisputed cases at the outset, and the applicable maximum or minimum, subject to § 10(f) adjustments if the case is one of permanent total disability, will be established by such entry. The situation in which § 6(c) makes a difference will be confined to cases in which the claimant's right to compensation is disputed and payments are delayed.

The other untoward result that the Director asserts will follow from the time-of-first-award determinant of § 6(c) is that it will produce "inequitable" results in that "benefits paid to otherwise-identical claimants would vary drastically based solely on one arbitrary difference in the procedural history of the claim." (Br. in Opp. 12). The Director's first mistake is in assuming that "workers who suffer the same injury on the same day, and incur the same disability that prevents them from earning the same wages during the same time period" but are distinguished by the entry of a compensation order in their favor are relevantly "identically situated." The claimant who receives a compensation order has the security, throughout the time the order is in effect and unless and until it is modified, of knowing that he will continue to receive the compensation to which he is entitled. The claimant without such an order receives such compensation only so long as the employer continues to be willing to provide it and is always at risk of faring no better than the Petitioner in this case, who was underpaid and had his

compensation stopped, reinstated, reduced, and terminated in the four and a half years between onset of disability and the filing of the award.

Cases affected by the § 6(b) upper limit are the highest-value cases, in which employers have the most incentive to encourage the claimant to accept a lump-sum settlement by being difficult, arbitrary, and dilatory. Those affected by the § 6(b) lower limit concern claimants who are likely to be the most vulnerable, in the event of any unwarranted suspension of payments, to extreme pressure to accept a settlement for substantially less than their full entitlement rather than wait for the outcome of the Act's slow-moving adjudication procedures to vindicate that entitlement. Both those groups of claimants therefore warrant an extra incentive for the employer to acknowledge the claimant's rights and agree to entry of a continuing award. The particular determinant of the applicable year's limits provided by Congress in § 6(c) provides such a disincentive to foot-dragging and pursuit of lump-sum discharges under the Act's settlement-approval procedure (§ 8(i); 20 C.F.R. §§ 702.241-.243) by application of financial pressure in such cases.

II. Review at the Present Juncture is Warranted.

The Director attempts to minimize the conflict between the decision of the court below in this case and the Fifth Circuit's decision in *Wilkerson v.*

Ingalls Shipbuilding, Inc., 125 F.3d 904 (1997), and argues that the question should be permitted to "percolate" in the lower courts before this Court intervenes. The first assertion is spurious, and the second undervalues the time of the federal judiciary and the long-suffering claimants who are subjected to an unreasonable interpretation of a clear statutory provision.

First, the characterization of the clear conflict between the decisions of the Ninth and Fifth Circuits as mere "tension" is difficult to comprehend. The Fifth Circuit held that "the statute makes plain that compensation is governed by the maximum rate in effect at the time of an award" and that § 6(c), in fact, was an "unequivocal statutory imperative" compelling application of the maximum in effect for the year in which the ALJ entered a compensation order in the claimant's favor. *Wilkerson*, 125 F.3d 906.[2] The court below explicitly disagreed with the Fifth Circuit, stating that it was "not persuaded" (Pet. App. 9). The conflict could not be clearer. Second, the Director (like the court below) criticizes the Fifth Circuit for providing "little support" for its "conclusory statements." The *Wilkerson* court, however, explicitly based its

[2] The Director suggests (Br. in Opp. 17) that *Wilkerson* is distinguishable because it involved a separate issue regarding whether the 1972 amendment to § 6 of the Act controlled. That assertion proves too much, however, as that argument merely presented a second hurdle that the Fifth Circuit had no difficulty concluding was overcome by the clarity of the statutory language.

decision on the plain language of the statute, which it found not only clear but also "unequivocal." This Court has long recognized that no more is necessary. *E.g.*, *Estate of Cowart*, 505 U.S. at 475.

The fact that the issue is also now pending in the Eleventh Circuit (*Boroski v. DynCorp Int'l*, No. 11-10033), and in a district court within the Fifth Circuit, Br. in Opp. 17-18, provides no basis for delaying this Court's resolution of the clear conflict, but rather suggests that the issue will continue to occupy the time and attention of the lower courts until resolved by this Court. This case presents no "frontier legal problems" (*cf. Arizona v. Evans*, 514 U.S. 1, 23-24 (1995) (Ginsburg, J., dissenting), but simply involves a straight-forward question of statutory construction. It is thus unlikely that resolution by this Court in this case will "stunt[ ] the natural growth and refinement of alternative principles." *Cf. California v. Carney*, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting). In any event, *Boroski* was orally argued on July 29, 2011, and the court inquired into the timetable for action on the present petition, and appeared inclined to act quickly enough for its disposition to be considered by this Court in the present case.

CONCLUSION

For these reasons, and the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 10-1399

NOV 1 3 2011

In The Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., and KEMPER INSURANCE CO., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-50 ("Longshore Act"), provides generally for compensation for total disability in periodic payments at a rate of two-thirds of the "average weekly wage of the injured employee at the time of the injury," and for most *partial* disabilities the same fraction of the difference between that weekly wage and the worker's residual "wage-earning capacity." *Id.* §§ 8, 10, 33 U.S.C. §§ 908, 910. But it has always imposed upper and lower limits on the rate payable as so determined. Section 6(b) of the Act, 33 U.S.C. § 906(b), provides that the compensation rate cannot be more than twice "the applicable national average weekly wage," as determined for each fiscal year; nor can compensation for total disability be less than the lesser of half the "applicable national average weekly wage" so determined and the worker's full pre-injury earnings. The question *which* fiscal year's limits are the "applicable" ones is addressed by § 6(c):

> Determinations under subsection (b)(3) of this section with respect to a [fiscal year] shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as *those newly awarded compensation during* such period.

QUESTION PRESENTED – Continued

33 U.S.C. § 906(c) (emphasis added). The determinant of the years whose limits are "applicable" under this provision has divided the three courts of appeals that have addressed it. The Court granted certiorari to resolve the question:

> Whether the phrase "those newly awarded compensation during such period" in Longshore Act § 6(c) makes the time an award is first entered determinative, or can and should be read to mean "those first *entitled to* compensation during such period," regardless of when an award is first entered.

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The opinion of the court of appeals (Pet. App. 1) is reported at 625 F.3d 1204. The decisions of the Benefits Review Board (Pet. App. 14) and the Administrative Law Judge (Pet. App. 33, 28) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2010. The order denying rehearing was entered on February 10, 2011. The petition for a writ of certiorari was filed on May 11, 2011, and was granted on September 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The only directly relevant provisions of the Longshore Act are those of § 6(b)-(c), as amended in 1972 and reenacted without substantive change (other

[1] The administrative decisions are, however, available at www.dol.gov/brb/decisions/lngshore/unpublished/Nov07/07-0382.pdf and www.oalj.dol.gov/Decisions/ALJ/LHC/2005/DR_v_SEA-LAND_SERVICES_2005LHC02193_%28OCT_12_2006%29_193756_CADEC_SD.PDF (Nov. 9, 2011) (all dates appended to web addresses herein are the dates the sites were last visited).

than extension to death-benefits cases) in 1984,[2] 33 U.S.C. § 906(b)-(c):

> (b)(1) Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> (2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this Act are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.
>
> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage

---

[2] As amended by Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1251, 1252 (Oct. 27, 1972), and Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 6, 98 Stat. 1639, 1641 (Sept. 28, 1984).

> for the period beginning with October 1 of that year and ending with September 30 of the next year. . . .
>
> (c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Other provisions of the Act implicated by the question presented are set forth in the Appendix of Relevant Statutory Provisions, *infra*.

STATEMENT

1. The Longshore Act requires employers to compensate workers who are disabled by employment injuries within its coverage. For total disability, whether temporary or permanent, the Act provides for periodic payments at a rate based on two-thirds of the workers' average weekly wage at the time of the injury; if the total disability is permanent, the rate of the continuing compensation is adjusted annually, proportionally to the previous year's increase in the national average weekly wage.[3] For most partial disabilities, the rate is two-thirds of the difference

[3] Longshore Act §§ 8(a), (b), 10(f), 33 U.S.C. § 908(a), (b), 910(f).

between that wage and the worker's residual earning capacity.[4] The figure calculated under § 8, however, is subject to upper and lower limits established under § 6(b)-(c), set out above. Section 6(b)(3) directs the Secretary of Labor[5] to determine, by October 1 of each year, the national average weekly wage that "shall be . . . applicable . . . for the period" of the following fiscal year. Even if two-thirds of the worker's lost earning capacity is greater, compensation cannot be payable at more than twice the "applicable" national average weekly wage, *id.* § 6(b)(1); and even if two-thirds of the pre-injury earnings is less, compensation for *total* disability cannot be less than half the "applicable" national average (unless the full pre-injury wages were less than that, in which case such full wages are payable), *id.* § 6(b)(3). Section 6(c) of the Act specifies which annual determination of the national average is "applicable": a given fiscal year's

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[4] *Id.* § 8(a), (b), (c)(21), (e), 33 U.S.C. § 908. The exceptions to the Act's general scheme of replacing two-thirds of lost earning capacity are permanent partial disabilities within the "schedule" of § 8(c)(1)-(20) and occupational diseases that become manifest after retirement, as to all of which the extent of physical impairment determines how much is payable. *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980); *Bath Iron Works Corp. v. Director, OWCP (Brown)*, 506 U.S. 153 (1993). Roberts's case is not within those exceptions.

[5] The Secretary has long delegated authority to make this determination, along with her other powers and duties under the Act, to the Director of the Office of Workers' Compensation Programs (OWCP). *See* Secretary's Order No. 10-2009, 74 Fed. Reg. 58834 (Dep't of Labor Nov. 13, 2009).

limits "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during [year], as well as those newly awarded compensation during such [year]."

2. The Act requires the employer to file a report with OWCP (*see* note 5, *supra*) of any injury within its coverage that causes loss of at least one shift of work, within ten days of awareness of it, and to pay compensation "periodically, promptly, and directly to the person entitled thereto, without an award, except where liability . . . is controverted"; the "first installment" is due within fourteen days. Longshore Act §§ 30(a), 14(a)-(b), 33 U.S.C. §§ 930(a), 914(a)-(b). If the employer does "controvert" its liability, it is required to file a notice, stating its grounds, with the OWCP district director (the statutory "deputy commissioner"[6]). *Id.* § 14(d). If it does not, "[a]ny installment of compensation payable without an award" that is not timely paid is augmented by 10 percent. *Id.* § 14(e). Any "payment of compensation . . . without an award" extends the time for the filing of a claim under § 13(a), 33 U.S.C. § 913(a).

Section 19 of the Act, 33 U.S.C. § 919, sets forth the procedures leading to the filing of a "compensation order" – "the order rejecting the claim or making

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[6] The title "district director" has been administratively substituted for the statutory term. *See* 20 C.F.R. §§ 701.301(a)(7), 702.105.

the award," § 19(e). Section 19(b)-(c) establishes very prompt timelines for disposition of a claim once it is filed, without reference to whether payments without an award are continuing. In particular, if no hearing is requested or considered necessary by the district director within 20 days of notice of the claim, "the [district director] shall, by order reject the claim or make an award in respect of the claim," § 19(c). If a hearing is required, the case is to be referred by the district director to the Department of Labor's Office of Administrative Law Judges, § 19(d); *see* 20 C.F.R. §§ 702.316-.317, and the ALJ is directed "by order [to] reject the claim or make an award" within 20 days after the hearing, § 19(c).[7]

If payments due under such an award are not made when due, they are subject to 20-percent augmentation, and the award is subject to judicial enforcement. Longshore Act §§ 14(f), 18(a), 21(d), 33 U.S.C. §§ 914(f), 918(a), 921(d). Compensation orders, whether denying claims or making awards, are subject not only to appellate review under § 21(b)-(c), 33 U.S.C. § 921(b)-(c), but also to "modification" by a "new compensation order," on grounds of either a "change in conditions or . . . a mistake in a determination of fact" in the original order, under the same procedures as provided for resolution of original claims. *Id.* § 22, 33 U.S.C. § 922. Acceptance of

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[7] By no means do the OWCP or the ALJs comply with the prompt-action directives of § 19(c). *See* pp. 43-44 *infra*.

compensation paid "under an award in a compensation order" starts the six-month period after which the right to bring suit against any "third party" legally liable for the injury passes from the injured worker, if he or she has not done so, to the employer. *Id.* § 33(b), 33 U.S.C. § 933(b).

3. Dana Roberts slipped and fell on ice in the course of his work as a longshoreman for Respondent Sea-Land Services at its marine terminal in Dutch Harbor, Alaska, on February 24, 2002 (*e.g.*, Pet. App. 65). The injuries to his shoulder and cervical spine required surgery and ultimately left him permanently partially disabled, ending his longshore career (Pet. App. 79-93, 97-107). Sea-Land's insurer under the Act, Respondent Kemper, filed notices of controversion pursuant to Longshore Act § 14(d), but paid Roberts compensation for temporary total disability for periods in 2002-2005 at a rate ($933.82 per week) that was less than any applicable maximum, and paid for some medical treatment. As of May 2005, it disputed Roberts's claim, and stopped paying anything (Pet. App. 46, 51-52, 101).

4. Following a hearing, an administrative law judge ("ALJ") issued a decision in October 2006 (Pet. App. 33-109) finding that Sea-Land was liable under the Act for both the shoulder condition and the cervical-spine condition. The ALJ found that Roberts had remained temporarily totally disabled from March 2002 through July 11, 2005, after which his residual condition was permanent; he found that a job for which Roberts was particularly suited had become

available to him in Anchorage, paying $720 a week, as of October 10, 2005. Accordingly, the ALJ awarded Roberts compensation for temporary total disability from March 2002 through July 11, 2005; for permanent total disability from July 12 to October 9, 2005; and for permanent partial disability from October 10, 2005 forward (Pet. App. 97-107). The ALJ determined that Roberts's average weekly wage at the time of the injury was $2,853.08, and that he had a residual weekly earning capacity as of October 2005 of $720 (Pet. App. 93-97, 103-07). Since not only the former figure but the difference between the two figures was greater than three times the national average wage in any year to date,[8] the rates specified by § 8(a), (b), and (c)(21) – two-thirds of his loss ($1,902.05 a week for periods of total disability, and $1,422.05 for his continuing permanent partial disability) – were greater than twice the national average, and the "applicable" maximum rate or rates under Longshore Act § 6(b)-(c) would control the weekly rate payable for each of Roberts's classes of disability. The ALJ, without discussion, ordered Sea-Land to pay compensation for each period of disability at what he referred to as "the maximum rate for *injuries occurring*" during fiscal 2002, $966.08, "plus any increases required

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[8] The national average weekly wages, and consequent maximum and minimum rates, for each fiscal year from 1973 (national average $131.80) to 2012 ($647.60), are tabulated on the OWCP's web site, at www.dol.gov/owcp/dlhwc/NAWWinfo.htm (Nov. 8, 2011).

under section 6 of the Longshore Act" during the period of permanent total disability (Pet. App. 107).

Roberts moved for reconsideration, arguing that the compensation rate should be $1,114.44, based on the national average weekly wage for FY 2007, when the ALJ's award was filed, in reliance on § 6(c) and *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997). Roberts acknowledged, however, that the Benefits Review Board's decision in *Reposky v. Int'l Terminal Services*, 40 Ben. Rev. Bd. Serv. (MB) 65, 73-77 (2006), issued between the ALJ's decision and the motion for reconsideration, controlled. He pointed out, however, that even under that decision, the local OWCP "district director" had calculated, and Kemper had paid, less than was due for the part of Roberts's permanent total disability in fiscal 2006. The ALJ accordingly denied reconsideration, but held that under *Reposky*, the appropriate rate for the final nine days of permanent total disability, in FY 2006, should be that year's maximum of $1,073.64, rather than $991 (the previous rate of $966.08 increased only by the percentage increase in the national average weekly wage for FY 2005 to that for FY 2006, under the annual-adjustment provision of § 10(f)), as calculated by OWCP and paid (Pet. App. 28-32).

5. Both Sea-Land and Roberts appealed the decision of the ALJ to the Benefits Review Board, which affirmed the order in all respects (Pet. App.

14).[9] With respect to the "applicable" years' maximum rates under § 6(c), the Board, adhering to its decision in *Reposky*, applied the limit for the year in which Roberts suffered his disabling injury to the compensation for all periods of his disability except the nine days of continuing permanent total disability in fiscal 2006. In *Reposky*, the Board had refused to depart from its previous interpretation of § 6(c), despite the decision of the Fifth Circuit in *Wilkerson* to the contrary. The Board reasoned that "the applicable maximum rate is the one in effect when the disability commences" (*Reposky*, 40 BRBS at 76) because the Senate committee report on the 1972 Amendments had characterized the maximum as applying to "those who begin receiving compensation for the first time during the period" (S. REP. NO. 92-1125, at 18 (1972), *quoted in Puccetti v. Ceres Gulf*, 24 Ben. Rev. Bd. Serv. (MB) 25, 31 (1990)). The Board adopted the Director's rationale that "newly awarded compensation during such period" should be read to mean *entitled* to compensation *for disability beginning* during such period, i.e., *first entitled to* compensation during such period, in order to "maintai[n] consistency in the statute and yiel[d] rational results." *Reposky*, 40 BRBS at 76. With respect to the "currently receiving" clause of § 6(c), applicable to

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[9] Sea-Land challenged the ALJ's ruling that Roberts's injury fell within the statutory coverage of the Act (Pet. App. 66-78); it did not seek review of the Board's affirmance (Pet. App. 20-26) of that decision.

permanent total disability, the Board adhered to its ruling in *Reposky* that not only should "receiving" be taken to mean *entitled to*, but "during such period" should be read to mean "at the beginning of such period," so that the compensation rate for such disability, from the time of permanency, remains at the maximum for the year in which the first disability commenced, and increases only after the end of the fiscal year in which the disability becomes permanent total, to the limit for the succeeding year. *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 77; Pet. App. 20.

6. On Roberts's petition for review, the court below affirmed the decision of the Benefits Review Board with respect to the compensation owed Roberts for his period of temporary total disability and for his ongoing permanent partial disability, concluding that "an employee is 'newly awarded compensation' within the meaning of section 6(c) when he first becomes entitled to compensation" (Pet. App. 9-10). The court acknowledged that the term "award" ordinarily refers to an adjudication and means a formal compensation order in some sections of the Longshore Act, but perceived that in other sections the terms "award" and "awarded" "refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order" (Pet. App. 6-8). Further, because both the employee's average weekly wage and his residual wage-earning capacity, each used in determining the amount of compensation payable, are to be calculated as of the time of injury, "[t]o apply the national average weekly wage with respect to a year other than the

year the employee first becomes disabled would be to depart from the Act's pattern of basing calculations on the time of injury" (Pet. App. 8-9).

The court below disagreed with the conclusion of the Fifth Circuit in *Wilkerson*, 125 F.3d at 906, that the "newly awarded compensation during such period" clause unambiguously makes the time an award is first entered determinative of the applicable year's limits, because it viewed the *Wilkerson* court as having "resolved the issue summarily and without expressing any reasoning" (Pet. App. 9). The court perceived that making the time an award is entered determinative "would have the potential for inequitable results." It rejected Roberts's point that the effect would simply be to encourage employers to expedite instead of delay the proceedings leading to an award; it reasoned that § 14(e) of the Act, 33 U.S.C. § 914(e), "already provides penalties for delay by an employer" (Pet. App. 9 n.1).

The court reversed part of the Board's decision, however, with respect to Roberts's period of permanent total disability, governed by the "currently receiving compensation" clause of § 6(c) (Pet. App. 10-12). Just as it had read "newly awarded compensation during" to mean "first entitled to compensation during," it read "currently receiving compensation for permanent total disability during" to mean "currently *entitled to* [such] compensation during":

> We believe the statute is clear: The "currently receiving" clause of section 6(c) unambiguously

> refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually paid it.

Pet. App. 12. Thus the compensation payable for Roberts's initial period of such disability, beginning in July 2005, was subject to that year's maximum – neither the 2002 limit applied by the Board nor the 2007 limit urged by Roberts (*id.*).

7. The several approaches to application of the maximum rates under § 6(b)-(c) are illustrated by their effects on the weekly rates of compensation payable for the periods of Roberts's temporary total, permanent total, and permanent partial disability (TTD, PTD, and PPD):

> (a) Paid before entry of the ALJ's FY 2007 award (unexplained by any maximum rate; presumably based on an "average weekly wage" about half that determined by the ALJ):
>
> TTD 3/12/02 – 7/15/03: $933.82
>
> TTD 9/1/03 – 5/17/05: $933.82
>
> (b) ALJ's original decision as implemented by OWCP:
>
> TTD 3/12/02 – 7/11/05: $966.08 (FY 2002 limit)
>
> PTD 7/12/05 – 9/30/05: $966.08
>
> PTD 10/1/05 – 10/9/05: $991.00 (§ 10(f) adjustment)

PPD 10/10/05 – present: $966.08

(c) ALJ's Order on Reconsideration, affirmed by BRB: Same as ALJ's original award, except:

PTD 10/1/05 – 10/9/05: $1,073.64
(FY 2006 limit)

(d) Court of appeals's decision: Same as (c), except:

PTD 7/12/05 – 9/30/05: $1,047.16
(FY 2005 limit)

(e) Due if Roberts was "newly awarded compensation during [FY 2007]" within the meaning of § 6(c):

All periods[10]: $1,114.44
(FY 2007 limit)

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[10] Roberts's two-and-a-half-month period of permanent total disability was entirely before the entry of the ALJ's award. If the "newly awarded" clause makes the time an award is entered determinative, the "currently receiving" clause is irrelevant to this case. Its function is to allow continuing compensation for permanent total disability and death to receive the annual adjustments provided for such cases by § 10(f) of the Act, 33 U.S.C. § 910(f), in maximum-rate cases as in all others, rather than leaving such continuing benefits subject to the maximum rate at any earlier time. In granting certiorari, the Court limited the subject of its review to the "newly awarded" clause.

SUMMARY OF ARGUMENT

A. When Congress uses unambiguous terms, they are supposed to provide the beginning and the end of inquiry into their meaning, except in the most extraordinary circumstances; and when it uses *different* terms as the determinants of the application of different provisions in the same statute, there is a strong presumption that the determinants are different. The terms of § 6(c) are perfectly clear. The Longshore Act provides for entry of "the order . . . making the award," and repeatedly distinguishes compensation payable "without an award" from that "payable under the terms of an award." It attaches a number of legal consequences to the latter that the former does not carry. The verbal form of the word "award" in § 6(c) does not change its clear meaning; a claimant is "newly awarded compensation" only when an order "making the award" is filed.

The court of appeals relied on the specificity in the final sentence of § 33(b) of the Act, defining "award" "[f]or purposes of this subsection" as a compensation order, as an indication that it must mean something else in other provisions, because otherwise the definition "would be unnecessary." That reliance was misplaced. By the time that sentence was added to § 33(b) in 1984, this Court had already held in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983), that "award" had the plain meaning provided by that definition even without it; it was indeed "unnecessary." Likewise, the court's assertion that some provisions of the Act use the term "award" or

"awarded" in contexts in which it could not have referred to a § 19(e) compensation order is incorrect; in each instance, Congress *was* referring to an award, not a mere entitlement. "[T]hose newly awarded compensation during such period" in Longshore Act § 6(c) cannot fairly be said to present any relevant ambiguity, and nothing elsewhere in the Act provides any basis for reading one into it.

B. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), the Court rejected the reading of § 33(g) of the Act, as amended in 1972 and modified in 1984, by the Benefits Review Board (and, until the question reached this Court, the Director). That subsection provides that if a "person entitled to compensation" settles a third-party tort action without the formal approval of the employer and insurer liable for compensation, the right to deficiency compensation under § 33(f) is forfeited. Despite misgiving about the result, the Court held that "entitle[ment]" was too clearly a different concept to be "interpreted" to refer only to claimants who had been awarded compensation or were receiving it at the time of settlement. This logically condemns the court of appeals's reading of "awarded" to mean "entitled to."

C. The court of appeals was likewise in error in relying on the general "structure" of the Act, which it thought "identifies the time of injury as the appropriate marker for other calculations relating to compensation." Its sole examples were § 10 of the Act, designating the worker's "average weekly wage at the time of the injury" as the basis of compensation rates,

and § 8(h), providing for determination of the worker's residual "wage-earning capacity." The latter provision actually is silent on the relevant time, although the courts of appeals have held that in order to make the comparison with the § 10 figure fair, the worker's residual earnings years after the injury should be converted to their time-of-injury equivalent. The only other provisions relevant to the calculation of the appropriate rate (besides § 6(b)-(c)), however, also added in 1972, are the inflation-adjustment features of § 10. The annual-adjustment provision of § 10(f) or 10(h)(3) applies depending on the time "the injury . . . occurred," regardless of when the resulting permanent total disability or death commenced or occurred, but the *initial*-adjustment provision of § 10(h)(1) depends on when "permanent total disability or death commenced or occurred," regardless of the time of the original injury. The annual-adjustment feature of § 10(f), (h)(1) is itself inconsistent with the supposed overarching "structure," in effectively substituting the *current* equivalent of the earnings at the time of the injury for the original figure as the basis for continuing compensation rates, including the vast majority to which § 6(b)-(c) has no application. Congress used various terms to establish the times of relevant determinants under the several rate-determinative provisions. There is no basis for imposing a "uniform" rule where Congress has provided different rules for different purposes.

D. In other provisions enacted at the same time as § 6(c), Congress used different terms, making their

applicability turn on the time entitlement, or the commencement of a particular class of disability. This further undermines the lower court's conclusion that the very different natural signification of the terms of § 6(c) should be read to make the maximum rate turn on the same thing naturally expressed in the other provisions. Roberts was never *awarded* any compensation until FY 2007. The fact that he was *entitled to* it from 2002 forward cannot be made to determine the "applicable" year's limit, on the two-thirds of his pre-injury earnings payable for his disability, without denying effect to the terms of § 6(c).

E. Applying § 6(c) as written produces no "inequitable" or incongruous results. It need have no effect at all except where there are delays attendant to litigation of disputes. So long as there is initial agreement on the claimant's right to temporary-disability compensation, entry of an award, embodying the agreement concerning the then existing and continuing entitlement, should be available on request, even if not entered as a matter of course as § 19(c) directs. In cases where litigation of a dispute does cause delays in entry of any award, the use of the § 6(b) rate limits applicable during the year in which the award is entered, in accordance with the ordinary meaning of § 6(c), merely imposes additional liability on the employer as a result. Contrary to the court of appeals's reasoning, this does not duplicate the remedy for delay provided by § 14(e), as the employer can readily avoid any such remedy by filing

a simple form (as employers nearly always do, and Sea-Land did here).

This Court has declined to read other terms into other provisions of the Act in several previous decisions, despite the fact that the results of the statutory terms in those cases produced far more apparent incongruity than that asserted as to § 6(c). "Awarded" should be given the meaning it has both in ordinary legal usage and in the rest of the Longshore Act.

ARGUMENT

Section 6(c) of the Longshore Act Unambiguously Makes the Time the Claimant Is "Newly Awarded Compensation," Not the Time He or She Is First Entitled to Compensation, the Determinant of the "Applicable" Limits on the Weekly Rate.

As this Court made clear in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), concerning the distinction between *entitlement to* compensation under the Act and *award or payment* of such compensation,

> [i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

The Fifth Circuit in *Wilkerson*, 125 F.3d at 906, recognized that § 6(c) "speaks with clarity" to the question which year's maximum applies to an award of compensation and, indeed, expresses an "unequivocal statutory imperative" that the maximum for the year in which the award is made applies. The Eleventh Circuit most recently has examined the question extensively, and rejected the reasoning and result of the court below in the present case. *Boroski v. DynCorp Int'l*, ___ F.3d ___, 2011 U.S. App. LEXIS 21776, No. 11-1033 (Oct. 27, 2011). In this case as in *Estate of Cowart*, "[t]he controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." 505 U.S. at 476. The supposedly inconsistent uses of the term "award" in the Act on which the court of appeals based its escape from the "statutory imperative" are illusory.

A. The Act Consistently Uses the Words "Award" and "Awarded" to Refer to an Order Establishing the Claimant's Rights, as Distinct from Entitlement or Even Payment.

Despite *Wilkerson*'s recognition of the statutory clarity, the Director purported to find ambiguity in § 6(c), and the Board accepted his position in *Reposky*. The ambiguity they found was not, however, the same as that found by the court of appeals. The Board never relied upon any ambiguity in the term "awarded compensation," nor did the Director, OWCP, either in urging the result in *Reposky* or in urging its

acceptance in the proceedings below. Rather, both the Board and, until the decision below, the Director accepted the settled and consistent meaning of an "award" under the Act, and the proposition that a claimant cannot be said to have been "awarded" compensation when he or she has become entitled to it but no § 19(e) "compensation order," "making the award," *ibid.*, has been filed. They found ambiguity instead in the phrase "*during* such period," which they reasoned could be taken to modify, not "newly awarded," but "compensation," or rather an implicit term, "disability," so that "newly awarded compensation during such period" means "entitled to compensation *for disability that began* during such period."[11] The court of appeals did not accept that syntactically untenable reading, which ignores the facts that "during such period" is an adverbial modifier of "newly awarded" rather than of "compensation" and that the phrase does not even refer to the *disability* for which the compensation is payable, and deprives

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[11] *See Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 74-76; Br. for Respondent Director, OWCP, 9th Cir. No. 08-70268, at 24-25 ("Roberts relies on the fact that the term 'award' is used to mean 'compensation order' in certain other places within the Act. See Pet. Br. at 14-18. This is true, but it hardly compels the conclusion that the plain language of Section 6(c) – even if it is torn from the Act and examined in a vacuum – is only amenable to Roberts' interpretation. As the Board correctly found, the critical difference between Roberts' interpretation ... and that employed by the Board and the Director lies not in the term 'awarded,' but in the term 'during.'").

"newly awarded" of any effect at all. *See Boroski v. DynCorp Int'l*, *supra*, Slip op. at 39-40.[12]

The court of appeals's entirely different theory that "award" does not have a consistent meaning throughout the Act, and that the time a claimant is "newly awarded compensation" within the meaning of § 6(c) can therefore be taken to refer to the time he or she is first *entitled to* compensation, is no more valid. The court acknowledged that "[t]he transitive verb 'award' has a settled meaning in the litigation context: It means '[t]o give or assign by sentence or judicial determination.'" 625 F.3d at 1206 (Pet. App. 6), *quoting Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010). In the Longshore Act in particular, although "compensation order" also encompasses an order denying a claim (§ 19(e)), the terms "award" and "compensation order" are otherwise interchangeable. "Award" has a specific meaning, and specific consequences flow from the entry of an "award." For example, an employer that fails to pay compensation "payable under the terms of *an award*" within ten days, absent a stay of the award pending review, is liable for a 20-percent augmentation of the amount otherwise due under the award. Act § 14(f), 33 U.S.C.

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[12] The Director's Brief in Opposition to the petition for certiorari set forth the "construction" he had previously urged only in a footnote (at 11 n.6), and adopted instead the court of appeals's theory that "awarded" (and also, for "consistency" with the result produced by that reading of the "newly awarded" clause, "receiving" in § 6(c)'s other clause as well) should be read as "entitled to."

§ 914(f). If an employer is in "default" of "payment of compensation due *under any award of compensation*" for thirty days, the person entitled to compensation may seek a "supplementary order" from the district director declaring the amount in default, on which a judicial judgment can be entered by a federal district court, under § 18(a), 33 U.S.C. § 918(a). Once a "compensation order making an award" has become "final" against appellate review, resort to mandatory-injunction proceedings directly in district court is available to enforce compliance, under § 21(d), 33 U.S.C. § 921(d). If the employer becomes insolvent, compensation owed "upon any award" may be paid by the Secretary of Labor out of the industry-financed "special fund" established by § 44 of the Act, 33 U.S.C. § 944, under § 18(b), 33 U.S.C. § 918(b). A claimant's acceptance of compensation *under an award* operates as an assignment to the employer of all rights against a third person who may be liable for the injury in tort, unless the claimant brings suit against such a third person within six months after such acceptance, under § 33(b), 33 U.S.C. § 933(b) (*see infra* at pp. 25-29). And the Secretary has discretion to "furnish such prosthetic appliances or other apparatus [as is] made necessary by an injury *upon which an award has been made* under th[e] Act," § 39(c)(2), 33 U.S.C. § 939(c)(2).

None of these consequences follows from a claimant's mere *entitlement to* compensation, nor even from the employer's payment of it "without an award." Such payment has different consequences under the

Act. Payment is due "without an award, except where liability to pay compensation is controverted by the employer" by filing a "notice" stating the grounds. Act § 14(a), (d), 33 U.S.C. § 914(a), (d). While a claim must otherwise be filed within a year of injury, "[i]f payment of compensation has been made without an award," the year runs from the date of the last such payment. Act § 13(a), 33 U.S.C. § 913(a). If "compensation payable without an award [because no notice of controversion has been filed] is not paid within 14 days after it is due," the employer is liable for a ten-percent augmentation of the amount otherwise owed. Act § 14(e), 33 U.S.C. § 914(e). But as long as it files a § 14(d) notice, the employer is free to terminate payments "without an award" at any time, without incurring any compensation liability beyond that eventually determined or acknowledged to have been payable. And acceptance of payments made without an award does not trigger the time after which a cause of action against a third party is assigned to the employer under § 33(b).

The last of these provisions explicitly spells out that the "award" that effects an assignment of third-party tort rights is "an award in a compensation order filed by the deputy commissioner." The 1984 amendment to this section added the final sentence of the current § 33(b):

> For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the

> deputy commissioner, an administrative law judge, or Board.

The court of appeals below relied on the specificity of the added sentence for its conclusion that "awarded" in § 6(c) could be given a different meaning: it

> . . . implicitly contemplates that the meaning of the term "award" in other sections is not limited to a formal compensation order. Unless "award" is used in other sections to mean something broader than a formal compensation order, the specific definition in section 33 would be unnecessary.

625 F.3d at 1207 (Pet. App. 8). That reasoning ignored this Court's decision in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983), and the legislative history of the addition of that sentence, neither of which it addressed.[13]

Section 33(b) as originally enacted in 1927 (Act of Mar. 4, 1927, c. 509, § 33(b), 44 Stat. 1424, 1440), § 33(b) made *any* "[a]cceptance of compensation" effect an election to accept compensation in lieu of any cause of action against others, and an assignment to the employer of any such rights. In amending it in 1938 to leave third-party actions in the hands of claimants for six months after acceptance of compensation

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[13] Because no party had contested that "newly awarded" referred to a compensation order making "the award" under § 19(e), *see* p.14 n.11 *supra*, the point was not briefed to the court below.

under an award, Congress spelled out that only acceptance of payments under an "award in a compensation order" would effect such an assignment. This valiant attempt to avoid any misunderstanding on the point proved ineffectual; some courts nevertheless ruled that an "informal" approval of payments by a deputy commissioner (or even his or her staff), evidenced by as little as accepting the employer's reports of the injury and notice of its institution of payments "*without* an award" under § 14(c), was enough to invoke the assignment provision.[14] This Court unanimously held to the contrary in *Pallas Shipping*:

> The term "compensation order" in the LHWCA refers specifically to an administrative award of compensation following proceedings with respect to the claim. In this case, no administrative proceedings ever took place, and no award was ever ordered by the Deputy Commissioner.

461 U.S. at 534. The Court emphasized the distinct legal consequences of entry of "an award," as distinct from informal actions on a claim and payments made "without an award." *Id.* at 533, 534-35 & n.3. And it made no distinction between "award" and "award in a

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[14] *E.g.*, *Rodriguez v. Compass Shipping Co.*, 617 F.2d 955 (2d Cir. 1980), *aff'd on other gr.*, 451 U.S. 596 (1981) (*see id.* at 598 n.3); *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977).

compensation order," using the terms interchangeably.

Conversely, in *Czaplicki v. SS Hoegh Silvercloud*, 351 U.S. 525 (1956), the deputy commissioner had entered a compensation order without a hearing, one day after notice was sent to the employer of the filing of the claim, awarding continuing compensation for temporary total disability subject to later modification. The Court held that despite its procedural prematurity (of which the claimant had no cause to complain), the order was an "award" so as to trigger both the appeal time after which its validity could not be challenged, under § 21(b), and the six months after which assignment of the third-party cause of action took effect under § 33(b). *Id.* at 528-29 & nn.9, 11. The Court went on to hold, however, that even after assignment has taken place under § 33(b), in cases of "conflict of interests and inaction by the assignee, the employee should not be relegated to any rights he may have against the assignee, but can maintain the third-party action himself." *Id.* at 529-32.

Before this Court decided *Pallas Shipping* in 1983, provisions amending § 33(b) on the point were included in the pending bills that were thereafter enacted, after amendments to many of their provisions, as the Longshore Act Amendments of 1984, *supra* n.2. The Senate's bill, reported two weeks before issuance of *Pallas Shipping*, and passed by the Senate in that form a month later, contained the additional clarification on which the court of appeals relied in this case. S. 38, 98th CONG., 1st Sess.,

§ 19(a), as reported by S. REP. NO. 98-81 (May 10, 1983). The version of the bill reported and passed by the House would instead have allowed payments *without* an award to begin the six-month period for the claimant to bring suit before assignment of the cause of action to the employer, but provided for reversion to the claimant after a "reasonable time." H.R. REP. NO. 98-570, at 30 (Nov. 18, 1983), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2763. The Conference Committee amendment adopted the current last sentence of the subsection from the Senate's version.[15] It explained that it was "in accord with" *Pallas Shipping*, but added:

> The conferees expect that an employer who does make voluntary payments will be able to obtain without delay the necessary compensation order constituting the formal award, so that the 6-month period may commence.

H.R. CONF. REP. NO. 98-1027, at 36 (Sept. 14, 1984), *reprinted in* 1984 U.S.C.C.A.N. 2771, 2786. The conference substitute was passed by both houses and signed within two weeks. Pub. L. No. 98-426, *supra* n.2, § 21(a), 86 Stat. at 1652.

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[15] The amendment, as adopted by the conference committee, also sought to solve the real problem with the existing version of the provision, which had made the § 33(b) questions that required this Court's attention in *Czaplicki* and *Pallas Shipping* important, by providing for reversion of the right of action to the claimant if the employer failed to exercise it within ninety days after the assignment took effect.

Against this background, the final sentence of § 33(b) did not warrant the court of appeals's reliance on it. The added specificity, "[f]or the purpose of this subsection," was indeed "unnecessary," since the provision had the unmistakable meaning, even before that sentence was added and *throughout* the Act, that the added sentence sought to nail down.

Besides the fact that the extraneous specificity of § 33(b) is not mirrored in § 6(c), the court of appeals relied on the assertion that "the LHWCA uses the terms 'award' and 'awarded' to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order," 625 F.3d at 1206-07 (Pet. App. 6-7), citing §§ 8(c)(20), 8(c)(22), and 10(h)(1). Its purported discovery of uses of the term "award" or "awarded" in the Act that "could not have meant 'assigned by formal order,'" 625 F.3d at 1206-07 (Pet. App. 6-8),[16] is illusory. The cited provisions reflect no necessary or natural inconsistency with the meaning of "the award" provided by § 19(e) and under the law generally, and do not even suggest, much less require, that those terms "refer to an employee's entitlement to compensation under the Act generally,

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[16] The court added "in the course of adjudication," Pet. App. 6, but as § 19(c) makes plain (*and see Czaplicki*, *supra* at p. 27, *and* H.R. CONF. REP. NO. 98-1027, *supra*), compensation orders making awards are not intended to be confined to cases in which a dispute requires "adjudication" in any formal sense, but are to be entered promptly, as a matter of course (or at least upon request), if a claim is initially undisputed, subject to later modification under § 22 under the same procedures.

separate and apart from any formal [compensation] order." Section 8(c)(20) provides that compensation "shall be awarded" for serious disfigurement; § 8(c)(22) specifies that where more than one permanent scheduled impairment under § 8(c)(1)-(19) results from an injury, "the award of compensation shall be" the sum of the scheduled allowances, running consecutively. Those references merely contemplate that *awards will be entered*, either promptly and ministerially where there is no dispute or after a formal hearing where there is a dispute, as directed by § 19(c) of the Act. Written in 1927, they did not contemplate the current administrative disregard of the last sentence of § 19(c). Indeed, § 8(c)(20) as originally enacted (44 Stat. at 1428) provided that "*[t]he deputy commissioner shall* award proper and equitable compensation," up to $3,500, for disfigurement of the face or head. In amending the provision in 1972 (at the same time it provided for ALJ hearings and created the Board) to raise the limit and extend its application to other parts of the body, Congress substituted the passive "shall be awarded." 1972 Amendments, *supra* n.2, § 7, 86 Stat. at 1255. Presumably that change was made because thereafter some awards would be made by ALJs and the Board; it evidences no intent to change the unmistakable reference to issuance of a compensation order to a reference to mere entitlement (or even payment without an award).

Likewise, § 10(h)(1) provides for an initial adjustment to post-1972 rates in cases in which "total

permanent disability or death . . . commenced or occurred prior to enactment" of the 1972 amendments – and in which the compensation payable had therefore been subject to the much lower previous limits of employer liability (maximum rate $70 a week, minimum $18, under § 6(b) as most recently theretofore amended in 1961). This explicitly makes the time of "commence[ment]" of such disability or "occur[rence]" of the death – *not* the time of an "award" – the critical determinant. The fact that it refers both to "the compensation to which an employee or his survivor *is entitled*" after the amendments, in its opening clause describing what is subject to the post-1972 "adjust[ment]," and to compensation that "*was awarded*" at less than the maximum rate provided at the time of a pre-1972 injury, in a proviso, does not remotely justify the conclusion of the court of appeals that "entitled to" and "awarded" are "apparently used . . . to mean the same thing" in § 10(h)(1), 625 F.3d at 1207 (Pet. App. 7).

Just as all agreed until the court of appeals's decision, the Act consistently uses the words "award" and "awarded" to refer to the filing of a compensation order under § 19(e) that makes "the award." The other uses of those terms on which the court of appeals relied provide no grounds for taking "newly awarded" in § 6(c) to refer to the time of anything other than the filing of a first award (uncontested or after ALJ litigation).

B. Just as "Entitled to Compensation" in § 33(g) of the Act Could Not Be Read to Mean "Awarded Compensation," a Claimant Cannot Be Considered to Have Been "Awarded Compensation" Within § 6(c) When He or She Is Entitled to It But No Award Has Been Filed.

Section 33(g) of the Act, as amended by the same 1972 amendments as the provisions here involved, provides that a "person entitled to compensation" who enters into a settlement with a liable third party without first obtaining the employer's approval forfeits the right to compensation and medical benefits from the employer. The Director and the Board there (just as here) had considered the consequences of applying the statutory term according to the natural meaning of the quoted phrase, so as to encompass *unpaid* claimants, anomalous and unduly harsh, and so had read "entitled to compensation" to mean "*receiving* compensation or having been awarded it"; and (again as here) the Ninth Circuit had agreed, but the Fifth Circuit had held that the unambiguous meaning of the phrase employed by Congress controlled and foreclosed the paid-or-awarded reading. This Court there agreed with the latter:

> Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means

> only that the person satisfies the prerequisites attached to the right.

Cowart, 505 U.S. at 477. The Court held that the forfeiture provision applied unambiguously to a claimant who did have a right to compensation under the Act when he settled a third-party tort claim, even though the employer was denying such entitlement, and no award had been entered or payments made, at the time. "[T]he stark and troubling possibility" that that rule would have harsh results, "creat[ing] a trap for the unwary" and providing a tool for employers to avoid liability for disabling injuries suffered in their employ, was an insufficient ground for substitution of another concept for its clear terms; as the Court concluded:

> It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Id. at 483-84.

The proposition this Court there rejected – that "person entitled to compensation" could be read to encompass only claimants receiving compensation or having an award of compensation at the relevant time – is the very converse of that advanced by the court of appeals. *Cowart*, 505 U.S. at 476. By a parity

of reasoning, the normal meaning of "those newly awarded compensation" requires more than that the claimant qualifies for the right to compensation, i.e., is *entitled to* it. As the court below began by acknowledging, the verb "award" has a settled legal meaning, requiring that a legal document *establishing* an entitlement or liability issue. Just as "entitled to compensation" cannot be read to mean "awarded or receiving compensation," so "newly awarded compensation" cannot be read as "newly entitled to compensation." Although of course *Cowart* did not address § 6(c), it addressed the unambiguous difference between "entitle[ment]" and "award" or "payment." The present issue should be controlled by *Cowart*'s recognition of that plain distinction.

C. The Act's Various Provisions Determinative of the Benefit Rates Payable Do Not Have the Singular Focus on the Time of the Injury, or of Commencement of First Disability, Posited by the Court Below.

The court below also justified its "holding that an employee is 'newly awarded' compensation when he first becomes disabled" on the ground that it

> . . . accords with the structure of the LHWCA, which identifies the time of injury as the appropriate marker for other calculations relating to compensation. For instance, the Act provides that the employee's average weekly wage – the starting point for determining compensation – is calculated at the

> time of injury. *See* 33 U.S.C. § 910. The employee's residual wage-earning capacity – used to offset the average weekly wage in cases of partial disability – is also calculated [*sic*; converted to its equivalent] at the time of injury. *See id.* § 908(c)(21), (e); *Johnston v. Dir., Office of Workers' Comp. Programs*, 280 F.3d 1272, 1277 (9th Cir. 2002). To apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled would be to depart from the Act's pattern of basing calculations on the time of injury.

625 F.3d at 1207 (Pet. App. 8). On the contrary, Congress used different terms, establishing different determinants, in several of the provisions affecting the rates payable.

The average weekly wage calculation under § 10 of course focuses on "the time of the injury." Section 8(h), the Act's provision for determining the worker's residual earning capacity in partial-disability cases under § 8(c)(21), (e), however, is silent on the relevant time; the cited *Johnston* decision is one of many in which the courts of appeals have held that the earning capacity once the claimant can return to some work, often several or more years after the injury, should be converted to its time-of-injury equivalent for comparison to the § 10 figure, so as not to understate the loss of earning capacity as a result of intervening inflation. But nothing in the statute explicitly so provides. The only other provisions determinative of weekly rates payable, besides § 6(b)-(c), are the

inflation-adjustment features of § 10(f), (h)(1), and (h)(3), added in 1972 and tweaked in 1984. Sections 10(f) and (h)(3) provide for annual adjustments in compensation for permanent total disability or death; the former, as enacted in 1972, was limited to cases of such disability or death "ar[ose] out of injuries sustained after" its enactment (1972 Amendments, *supra* n.2, § 11, 86 Stat. at 1258. Section 10(h)(3) made that provision applicable as well to post-1972 compensation in pre-1972-injury cases, with the extra liability borne by an industry-financed fund and appropriations. *Id.*[17] But § 10(h)(1), providing for the more substantial *initial* adjustment to benefits capped by the pre-1972 limits of § 6(b) (and, for death cases, § 9(e)), used a critically different determinant: whether the "permanent total disability or death . . . commenced or occurred" prior to enactment of the amendment. Section 10(h)(3) thus conforms to the "pattern" described by the court below, but § 10(h)(1) does not. The variation in the terms of these provisions has been given effect by recognition – at the urging of the Director – that different determinants apply to their applicability (as well as that their references to the *enactment* date of the 1972 amendments, rather than their effective date thirty days later, dictates the critical dividing line). *E.g.*, *Director, OWCP v. Bath*

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[17] Although the explicit limitation to post-1972-injury cases was dropped from § 10(f) when it was amended in 1984, § 10(h)(3) continues to limit § 10(f)'s imposition of liability on *employers* to such cases.

Iron Works Corp., 885 F.2d 983, 991 (1st Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 421-23 (5th Cir. 1980).

The annual-adjustment feature of § 10(f) as well is a departure from the supposedly unvarying "pattern" of basing compensation on circumstances at the time of the injury. Its placement in § 10 (like that of § 10(h)), entitled "Determination of Pay," reflects its function: to allow the continuing compensation in the most serious and long-term cases to reflect the *current* loss of income resulting from the injury, years after its onset, by reference to increases in wage levels generally since the time of the injury.

The several provisions of the Act whose application goes into determining the applicable rate for a particular period of disability are not limited to the average-weekly-wage and residual-earning-capacity provisions of § 10(a)-(e) and § 8(h). Some of the others – not uniquely § 6(c) – do not make the time of injury determinative, but specify varying events as those whose timing is critical. Section 10(h)(1) in particular "designat[es]" the national average wage for FY 2003 as the worker's average wage at the time of the injury in pre-1972 permanent total disability and death cases, for purposes of post-1972 benefits, even where the injury occurred decades earlier when the worker's earnings were a small fraction of that current average. The Act creates no unvarying "pattern" of basing everything on the time of injury, much less of basing it on the time of onset of *some* disability for which the

worker is entitled to compensation (sometimes years after the injury that leads to such onset).

Even if there were an all-inclusive pattern of determining benefits by reference to circumstances at the time of the onset of first disability, from which § 6(c) was the sole departure, that would be an insufficient ground for denying effect to the departure, in the absence of strong reasons to conclude that it was inadvertent. In *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979), the Court considered whether the 1972 version of § 6 imposed a maximum rate on death benefits under the Act. The Director contended that the 1972 version of what is now § 6(c) should be read to make the § 6(b)(1) maximum applicable to death cases, relying on the pattern maintained under the Act from its inception through three previous amendments, which effectively imposed the same rate limit on death benefits as on disability compensation; on the "assumed . . . congressional intent to avoid disparate treatment"; on his perception that failure to read the statute to impose any upper limit on death benefits would produce "an absurd and discriminatory consequence"; and on an unelaborated statement in a sentence of the drafting Congressional committee's report. *Id.* at 35-47 & nn.8, 15. The Court rejected the arguments: "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' Our task is to interpret what Congress has said[.]" Congress picked up its pen again in 1984 and amended § 6(b)(1) to its present form, applying maximum rates explicitly to

death and disability cases alike. That was properly a legislative function. *Cf. Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 280 (1980) (rejecting position of the Board, Director, and the court of appeals that worker who lost substantial part of his earning capacity because of "scheduled" injury under § 8(c)(1)-(19) could opt out of the schedule and recover instead compensation based on partial loss of earning capacity under § 8(c)(21); "Respondents suggest two reasons why th[e prior] settled construction is erroneous. They submit that it does not fulfill the fundamental remedial purpose of the Act and that it may produce anomalous results that Congress probably did not intend. The first submission is not entirely accurate; the second, though theoretically correct, has insufficient force to overcome the plain language of the statute itself.").

Finally, in any event, the time of injury, the factor the court below found the consistent focus of the benefit-rate determinants, is not even the same time that is determinative of the § 6(b) maximum according to the Board, the Director, and the court of appeals. Their rule is instead that it is the time of *onset of disability*, or *entitlement*, that is critical – even though that may be years after the injury, as in the case in which the Board first held that it is the time of onset of disability, not injury, that determines the applicable year's maximum (*Kubin v. Pro Football, Inc.*, 29 Ben. Rev. Bd. Serv. (MB) 117, 122 (1995) (five-year difference)). There is no other benefit-rate provision in the Act that makes that the standard,

any more than there is any other that makes the time an award is filed the critical factor. The Director's and court of appeals's "structure" and "pattern" reasoning does not even support their time-of-*commencement-of-disability* rule.

D. Congress Knew How to Make the Time of Injury, or of Onset of Disability and Entitlement, Determinative, as It Did in Other Provisions Enacted at the Same Time as § 6(c).

The same Congresses that passed and reenacted § 6(c) in 1972 and 1984 used phrases elsewhere in the same amendments to the Act that *did* naturally and unambiguously provide the determinant the court below read into "newly awarded" in § 6(c). Longshore Act § 10(h)(1) ("compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment"), § 33(g) ("entitled to compensation" at the time of entry into a third-party tort settlement). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Surely that presumption is all the stronger where Congress uses different terms, with different established meanings, in the related provisions, so that reading the one section's standard

into the other would require first that its own different terms be read out. Congress's use of a phrase in § 6(c) with a completely different natural signification from that of the readily available terms of §§ 10(h)(1) and 33(g) forecloses reading it as if they had used one of those formulations. The § 6(b) limit for FY 2007, "during" which Roberts was "newly awarded compensation," governs all his compensation.

E. Application of the "Newly Awarded Compensation" Standard Produces No "Inequitable" Results.

The court of appeals added that it believed the natural reading of "newly awarded" "would have the potential for inequitable results" in making the claimant's entitlement vary with delay in entry of an award. It acknowledged Roberts's point that such variation "encourages employers to expedite [entry of an award] rather than delay the process," but reasoned that this "argument is undercut by the fact that section 14[(e)] of the LHWCA already provides penalties for delay by an employer." 625 F.3d at 1208 (Pet. App. 9 n.1). Even if, contrary to *Cowart*, the wisdom or fairness of the result of the statutory terms were legitimately open to consideration, the fact is that § 14(e) *in terms has no application* to any case in which the employer files a one-page form under § 14(d), as Sea-Land did in the present case, stating that it "controverts" the claimant's entitlement (even, according to the Board, if the notice does not state any good-faith or colorably legally sufficient

ground, but is demonstrably pretextual (*Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 Ben. Rev. Bd. Serv. (MB) 47 (2004)). Sadly, it thus serves as no disincentive at all to employers' delay of proceedings, and payment, under the Act. Neither in this case nor in *Boroski*, *supra* at p. 20 – in which it took six years from the onset of totally disabling blindness for the claimant to secure the award and any payment at all – was the employer liable for any additional compensation for delay under § 14(e).

Nor will application of the clear meaning of the statutory terms of § 6(c) have harsh or incongruous effects. Rather, following the statute as written will simply provide a claimant with a higher benefit, at a concomitant cost to the employer, if entry of an award is substantially delayed. The court's concern for potential inequitable results if the plain meaning of the language of § 6(c) is followed, is misplaced. Imposing a cost on an employer that delays the payment of compensation (or, where it does pay at least something without an award, nevertheless delays the embodiment of a claimant's so-far-acknowledged rights in a continuing award, summarily enforceable until and unless modified and subject to 20-percent augmentation if not paid when due) by litigation is fully consistent with the Longshore Act's goal of encouraging prompt payments contemporaneous with the disability for which it is payable. The fact that this goal is also reflected in statutory provisions requiring, under defined circumstances, augmentation of compensation that is not promptly paid neither undercuts

the consistent result of applying § 6(c) as written, nor renders the consequence of its plain meaning either unnecessary or duplicative, as the court reasoned.

If § 19(c)'s directions for prompt issuance of an award on an undisputed claim as soon as the employer has been notified of it, and for prompt hearing and decision in any case in which the district director cannot bring the parties to early agreement on the claimant's rights to date and issue an award of continuing compensation, were a reality, the distinction between the fiscal year in which disability commences and that in which the claimant is first awarded compensation would make little difference. It would affect only those maximum- and minimum-rate cases in which the disability began shortly before the end of a fiscal year, so that the award was not entered until the following year; and even in those cases, its effect would be only the increase of a few percent in the "applicable" national-average figure from one year to the next. But in practice the district directors rarely issue compensation orders on uncontested claims in which the employer is making payments, and never with the promptness directed by the final sentence of § 19(c); and many ALJs frequently take over a year, and occasionally several years, after hearings (which are now routinely preceded by months or more of formal discovery) to file their compensation orders with the district directors. Roberts was relatively fortunate in having an award less than a year and a half after Respondent Kemper had stopped paying any compensation and providing any

medical benefits. *Cf. Boroski supra*. Section 19(c) nevertheless establishes the administration that the Act's provisions contemplate. *See* H.R. CONF. REP. NO. 98-1027, *supra* at p.21.

The court of appeals recognized Roberts's argument that making the time the award is entered determinative of the applicable maximum "encourages employers to expedite administrative proceedings rather than delay the process," but reasoned that this "argument is undercut by the fact that section 14[(e)] of the LHWCA already provides penalties for delay by an employer." 625 F.3d at 1208 (Pet. App. 9 n.1). An employer can avoid paying the augmented compensation to which the court of appeals referred, simply by filing a notice "controverting" the claim, as Sea-Land did here. Imposing an extra liability on the employer where the claimant's receipt of compensation, and of the security of an award that ensures its continued payment until such time as the award may be modified, is delayed is fully consistent with the purposes of the Act.

In *Rasmussen*, in *Potomac Electric*, and in *Cowart*, the Court was told that the clear terms of the statute worked manifest injustice or were inconsistent with underlying basic purposes or patterns of the Act as a whole. It found such claims insufficient to warrant reading ambiguity into the statutory terms where there was none. Anything that may serve as a disincentive for employers and their insurers to the delays that often render the Longshore Act system ineffective will serve the central purpose

of the basic workers'-compensation bargain – to provide its limited forms of relief *promptly* during an injured worker's disability, in lieu of the potential for more complete indemnity after the delays and subject to the limitations of tort-liability litigation.

The decisions of the courts in *Wilkerson* and *Boroski* not only reflect the natural meaning of the words of the statute, but also result in an application of the statutory terms that is consistent with the statutory purpose. The Ninth Circuit's decision in this case does neither.

CONCLUSION

The Court should reverse the decisions below, and hold that Roberts's compensation is subject to the § 6(b)(1) limit applicable during FY 2007, when he was first "awarded compensation," rather than that for FY 2002.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

Parts of §§ 8, 10, 14, 18, 19, 22, and 33 of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 906, 908, 910, 914, 918, 919, 922, and 933, bear indirectly on the meaning of § 6(c). They provide:

COMPENSATION FOR DISABILITY

Sec. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66-2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. . . .

(b) Temporary total disability: In case of disability total in character but temporary in quality 66-2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66-2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

. . .

(12) Fourth finger lost, fifteen weeks' compensation.

. . .

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in th[is] class of disability, the compensation shall be 66-2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

. . .

DETERMINATION OF PAY

Sec. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

. . .

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of –

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b) of this Act, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

. . .

(h)(1) Not later than ninety days after the date of enactment of this subsection [October 27, 1972], the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date, and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date. . . . Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems

relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection, shall be considered to have occurred on the day following such date.

PAYMENT OF COMPENSATION

Sec. 14. (a) Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 12, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner

determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controvered, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section. . . .

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum

thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payment has been issued by the Board or court.

. . .

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

DEFAULTED PAYMENT

Sec. 18. (a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as

provided in section 19, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. . . . The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. . . . Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. . . . No fee shall be required for filing the supplementary order nor for entry of judgment thereon. . . .

PROCEDURE IN RESPECT OF CLAIMS

Sec. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant),

whom the deputy commissioner considers an interested party, that a claim has been filed. . . .

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing . . . , and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by an administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by

registered mail or by certified mail to the claimant and to the employer at the last known address of each.

. . .

REVIEW OF COMPENSATION ORDER

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b)(1) There is hereby established a Benefits Review Board. . . .

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

. . .

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . .

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred. . . . If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

MODIFICATION OF AWARDS

Sec. 22. Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f)), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy

commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Sec. 33. (a) If on account of a disability or death for which compensation is payable under this Act, the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against

such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

. . .

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. . . .

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative).

RESPONDENT'S BRIEF

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ON WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, disabled maritime workers are paid compensation based on their average weekly wage at the time of their disabling injury. See 33 U.S.C. 908, 910. This compensation is subject to a maximum of twice the "applicable" fiscal year's national average weekly wage. 33 U.S.C. 906(b)(1). The Secretary of Labor determines the national average wage for each fiscal year, 33 U.S.C. 906(b)(3), and that determination applies "to employees or survivors * * * newly awarded compensation during such period." 33 U.S.C. 906(c). The question presented is whether the "applicable" Secretarial determination is the national average wage for the year during which an employee suffers a disabling injury or the year during which a formal compensation order is issued.

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 625 F.3d 1204. The decisions of the Benefits Review Board of the United States Department of Labor (Pet. App. 14-27) and the administrative law judge (Pet. App. 28-32, 33-109) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2010. A petition for rehearing was denied on February 10, 2011 (Pet. App. 110-111). The petition for a writ of certiorari was filed on May 11, 2011, and granted on September 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 906(b) and (c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. 901 *et seq.*, provide:

> **(b) Maximum rate of compensation**
>
> (1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> (2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.
>
> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Applicability of determinations

Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Additional statutory provisions appear in the appendix to this brief.

STATEMENT

1. The Longshore Act establishes a federal workers' compensation system for an employee's disability or death arising in the course of covered maritime employment. 33 U.S.C. 903(a), 908, 909. The Act was "designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 636 (1983). "Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Ibid.*

Under the Longshore Act, disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), is "in essence an economic, not a medical, concept." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). Accordingly, the Longshore Act has from the beginning provided that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute com-

pensation." 33 U.S.C. 910; see 33 U.S.C. 910 (Supp. I 1928) (same).

Subject to a specified maximum and minimum, discussed below, (see pp. 5-6, *infra*), a totally disabled worker's compensation rate is two-thirds of his average weekly wage at the time of injury. 33 U.S.C. 908; see 33 U.S.C. 908(a) (Supp. I 1928) (same).[1] "This proportion," which is common to many workers' compensation schemes, "represent[s] a rough judgment about the adjustments needed to reflect the reduction in the disabled worker's work-related expenses, and to provide him an incentive to return to work." *The Report of the National Commission on State Workmen's Compensation Laws* 56 (1972) (*National Commission Report*).

> As the proportion of wages replaced is increased, the worker is assumed to have less incentive to return to work. Of course, if the proportion is too low, a worker may be in such dire circumstances that he may be forced to return to work before he is properly

---

[1] Partially disabled employees, who are able to work after their injuries at a diminished wage, are typically entitled to two-thirds of the difference between their pre-disability average weekly wage and their "residual earning capacity" (*i.e.*, the wages they earn or could earn through suitable alternative employment). See 33 U.S.C. 908(c)(21). In addition to this classification of disabilities as total or partial, disabilities under the Act are also categorized as "temporary" or "permanent." A disability is "temporary" if the claimant's medical condition is improving, and it becomes "permanent" when the claimant reaches maximum medical improvement. See 33 U.S.C. 908(a)-(e); see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). As happened in this case, a claimant's disability status can change even after it becomes "permanent" if, for example, suitable alternative employment is later identified, thus transforming the disability from permanent total to permanent partial.

> recovered or he may become so demoralized as to be indefinitely disabled.

Ibid.

a. The Act has always placed upper and lower limits on compensation rates, applied after the calculation of two-thirds of the worker's average weekly wage at the time of injury. Maximum benefit levels are a typical feature of workers' compensation schemes because high-wage workers can obtain their own private disability insurance to replace part of their lost income, and because such limits conserve resources for the system to provide to more-needy disabled employees. See *National Commission Report* 37-38. Conversely, minimum benefit levels are intended to prevent low-wage disabled workers from ending up on public assistance because a "low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers." *Id.* at 37.

The floor and ceiling levels have changed through the years. But with each change, those levels, like the employee's average weekly wage that provides the starting point for benefit calculation, have been keyed to the time of an employee's disabling injury. As originally enacted in 1927, the Longshore Act provided that "[c]ompensation for disability shall not exceed $25 per week nor be less than $8 per week: *Provided, however*, That if the employee's wages at the time of injury are less than $8 per week he shall receive his full weekly wages." 33 U.S.C. 906(b) (Supp. I 1928).

In 1948, Congress enacted the first of a series of increases to the minimum and maximum benefit levels under the Longshore Act. See Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602 (increasing maximum weekly benefit level to $35 and minimum level to $12). Congress

specified that those increases (along with the other changes made by the 1948 amendment) "shall be applicable only to injuries or deaths occurring on or after the effective date" of the amendments. See *id.* § 6, 62 Stat. 604. Because of that provision, an employee who suffered a disabling injury (or death) before enactment of the 1948 amendments was subject to the old minimum and maximum benefit levels, even if he received a formal compensation order (a formal administrative order specifying benefit levels under the Act, see 33 U.S.C. 919(e)) after enactment.

Congress increased both maximum and minimum benefit levels again in 1956 and the maximum benefit level in 1961. See Act of July 26, 1956, ch. 735, § 1, 70 Stat. 655 (maximum to $54 and minimum to $18); Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203 (maximum to $70). In both instances, Congress again expressly provided that the increases would be tied to the time of disabling injury (or death), not the time of a formal compensation order. See § 9, 70 Stat. 656 (amendments made to benefit floor and ceiling "shall be applicable only with respect to injuries and death occurring on or after the date of enactment"); § 4, 75 Stat. 204 ("The amendments made by the foregoing provisions of this Act shall become effective as to injuries or death sustained on or after the date of enactment.").

b. Throughout this period, Congress was aware that "economic changes * * * affect[ing] the levels of wages and living costs" made periodic increases in the maximum and minimum benefit levels necessary because the Act lacked a "self-adjustment feature." H.R. Rep. No. 2067, 84th Cong., 2d Sess. 1-2 (1956); see S. Rep. No. 481, 87th Cong., 1st Sess. 2 (1961). Without such a feature, maximum and minimum benefit levels eroded over

time, and the only remedy was for Congress to amend the Act. Thus, "[t]he $70 maximum on death and disability benefits, established in 1961, gradually lost real value as inflation exacted its annual toll, and in 1972 Congress moved to give covered workers added protection." *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 32 (1979) (footnote omitted); see *id.* at 32 n.4 ("The $70 limitation on death and disability benefits precluded most employees and their survivors from receiving 66 $^{2}/_{3}$% of the employee's average weekly wages, and in some cases the $70 maximum constituted as little as 30% of the employee's average weekly wages."). In response to this problem, when Congress amended the Longshore Act in 1972, it not only made the maximum and minimum benefit levels more generous, but also provided a self-adjustment mechanism. See 33 U.S.C. 906. The result was to make later statutory revisions of maximum and minimum benefit levels unnecessary.

The 1972 amendments provided that the previous fixed-dollar maximum and minimum benefit levels would be replaced with calculations based on the "applicable national average weekly wage." 33 U.S.C. 906(b)(1) and (2); see 33 U.S.C. 902(19) (defining "national average weekly wage" as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls"); *Rasmussen*, 440 U.S. at 32.[2] The

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[2] Unlike with the 1948, 1956, and 1961 amendments, "[t]he drafters of the 1972 amendments decided that the newer, more generous statutory terms should also apply to pre-1972 cases of disability and death." *Director, OWCP* v. *Bath Iron Works Corp.*, 885 F.2d 983, 986 (1st Cir. 1989) (Breyer, J.), cert. denied, 494 U.S. 1091 (1990). But Congress effectuated this choice in a way that textually preserved the link between time of injury and benefit levels. The amendments provided that compensation for "total permanent disability or death which com-

national average weekly wage is determined by the Secretary of Labor each year, and is "applicable" for the "period," or fiscal year (FY), from October 1 of that year until September 30 of the next. 33 U.S.C. 906(b)(3). For FY 1973 (which ended on September 30, 1973), Congress set the maximum benefit rate under the Longshore Act at 125% of the "applicable" national average weekly wage. Congress then increased that rate by 25% per year until it reached 200% of that average wage for FY 1976 and all subsequent fiscal years. 33 U.S.C. 906(b)(1) (Supp. II 1972). Congress likewise used the national average weekly wage as the basis for calculating minimum benefits under the Act, providing that compensation for total disability shall not be less than 50% of the national average weekly wage (unless the employee's own average weekly wage was below that figure). See 33 U.S.C. 906(b)(2).[3]

The Act provides that the national average weekly wage for a particular year "shall apply to employees or survivors [1] *currently receiving* compensation for permanent total disability or death benefits during such period," and [2] "those *newly awarded* compensation during such period." 33 U.S.C. 906(c) (emphases added).

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menced or occurred prior to enactment of [the 1972 amendments] shall be adjusted" by "computing the compensation to which such employee or survivor would be entitled *if the disabling injury or death had occurred on the day following such enactment date*." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 11, 86 Stat. 1258 (emphasis added); see 33 U.S.C. 910(h)(1).

[3] The historical list of national average weekly wages may be found at http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm. The national average weekly wage for the current fiscal year (October 1, 2011 to September 30, 2012) is $647.60, resulting in a maximum Longshore Act weekly benefit of $1295.20 and a minimum of $323.80.

The Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), who administers the Longshore Act, see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997), has long interpreted the "newly awarded" clause of Section 906(c) to require application to initial benefit calculations of "the national average weekly wage * * * applicable at the time of injury," United States Dep't of Labor, Employment Standards Administration, OWCP, *Workers' Compensation Under the Longshoremen's Act* (1979), not the time of any later compensation order, if one is ultimately entered.[4] By contrast, the "currently receiving" clause of Section 906(c) operates as a cost-of-living adjustment and applies each year's national average weekly wage to adjust maximum and minimum compensation levels, but applies only to persons currently receiving death or permanent total disability benefits on a prospective basis. See 33 U.S.C. 906(c); see also 33 U.S.C. 910(f).

c. The Act obligates an employer to pay compensation "promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. 914(a). If an employer that does not file a notice controverting liability fails to start payments within 14 days of receiving notice of a disabling injury from the employee, it must pay an additional ten percent of the overdue amount. 33 U.S.C. 914(e). While the employee must give notice of disability to the employer in order to be entitled to benefits, see 33 U.S.C. 912; 20 C.F.R. 702.211(a), the employee need not file a formal claim with the OWCP if the employer commences payments

[4] The most recent version of this document is from 2003 and includes the same statement. See http://www.dol.gov/owcp/dlhwc/LS-560pam.htm.

and there is no disagreement about the amount. And even when an employee does file a formal claim, the district director of the OWCP often is able to resolve the matter informally. See 20 C.F.R. 301 *et seq.*[5] "[I]n practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975).

2. On February 24, 2002, petitioner slipped on ice and was injured while working for respondent Sea-Land Services, Inc. (Sea-Land) in Dutch Harbor, Alaska. Pet. App. 34, 37. He sought medical treatment two days later, but continued working until March 11, 2002. *Id.* at 37-38. Sea-Land's insurer, respondent Kemper Insurance Company (Kemper), paid petitioner compensation for temporary total disability from March 11, 2002 until July 15, 2003, and again from September 1, 2003 until May 17, 2005. *Id.* at 101. Kemper did so without entry of a compensation order. See 33 U.S.C. 914(a). After Kemper ceased payments at the end of that period, the matter was referred to an administrative law judge (ALJ) for a hearing in January 2006. Pet. App. 34; 20 C.F.R. 702.317.

3. a. In October 2006, the ALJ found that petitioner had suffered a disabling injury in the course of his maritime employment and was entitled to Longshore

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[5] District directors are officials in the OWCP responsible for the day-to-day administration of the Act, including attempts to informally resolve disputes. Because awards by ALJs are not effective until filed by a district director, 33 U.S.C. 921(a), district directors are frequently charged with the responsibility to calculate the amount of compensation due under ALJ decisions. The statute uses the term "deputy commissioner" rather than "district director," but the authority of the position remains unchanged. 20 C.F.R. 701.301(a)(7).

Act benefits. Petitioner was awarded compensation for temporary total disability from the date he became disabled, March 11, 2002, until his condition reached maximum medical improvement, or permanence, which the ALJ found was on July 11, 2005. Pet. App. 107-108. For the subsequent period from July 12, 2005, through October 9, 2005, petitioner was awarded compensation for permanent total disability. *Id.* at 107. The ALJ further found, however, that, beginning October 10, 2005, suitable, albeit lower-paying, alternative employment was reasonably available to petitioner, *id.* at 104-107. The ALJ consequently determined that petitioner was entitled to compensation for permanent partial disability from that date until Sea-Land and Kemper were ordered otherwise. *Id.* at 107-108.

The ALJ determined that petitioner's average weekly wage at the time of his injury, as calculated under Section 910 of the Act, was $2853.08, and that his residual earning capacity after October 10, 2005 was $720 per week. Pet. App. 95, 107. Based on his average weekly wage, petitioner's compensation rates, as calculated under Section 908, were: $1902.05 for his periods of total disability ($2853.08 x 2/3); and $1422.05 for his periods of partial disability (($2853.08 - $720.00) x 2/3). See p. 4 & n.1, *supra*.

Both of these compensation rates exceeded $966.08 per week, the maximum rate in effect for the year in which petitioner was injured (FY 2002). Consistent with the Director's longstanding position, see p. 9, *supra*, the ALJ found that petitioner was limited to that maximum rate for all periods of temporary total and permanent

partial disability. Pet. App. 107-108.[6] The ALJ also ordered Sea-Land to "pay interest on each unpaid installment of compensation from the date the compensation became due." *Id.* at 108. The ALJ ordered the district director to make the calculations necessary to implement the award. *Ibid.*

b. Although petitioner had previously agreed that the maximum compensation rate applicable at the time of his disabling injury ($966.08) applied, see Pet. App. 101, he sought reconsideration, arguing that he was entitled to the FY 2007 maximum rate of $1114.44 because the ALJ's compensation order (dated October 12, 2006, see *id.* at 33) was issued in that fiscal year. In a supplemental memorandum, however, petitioner conceded that the ALJ's application of the FY 2002 maximum rate was correct under binding Benefits Review Board (Board) precedent, *Reposky* v. *International Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (Oct. 20, 2006), which was issued after the ALJ's initial decision. Pet. App. 29. The ALJ agreed that *Reposky* controlled and thus denied the motion for reconsideration. *Id.* at 28-32.

In *Reposky*, the Board, adopting the longstanding position of the Director, held that a claimant is "newly awarded" compensation, for purposes of Section 906(c), "when benefits commence, generally at the time of injury." 40 Ben. Rev. Bd. Serv. (MB) at 74. Accordingly, the Board rejected the contention that the applicable

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[6] For periods of permanent total disability, the ALJ determined that petitioner was entitled to that same rate, "plus any increases required under section [906] of the Longshore Act." Pet. App. 107. The ALJ was apparently referring to Section 906(c)'s "currently receiving" clause, which applies a new fiscal year's national average wage to claimants "currently receiving compensation for permanent total disability or death benefits during such period." 33 U.S.C. 906(c).

national average weekly wage is the one in effect at the time a formal compensation order is issued. *Id.* at 74-76. The Board agreed with the Director's position that applying the national average weekly wage for the year of the disabling injury "maintains consistency in the statute and yields rational results." *Id.* at 76; see *ibid.* (approach "achieve[s] consistent results for all claimants").

4. Petitioner, Sea-Land, and Kemper appealed the ALJ's decision to the Board, which affirmed in all respects. Pet. App. 14-27. The Board, relying on *Reposky*, rejected petitioner's argument that he was "newly awarded" compensation in October 2006, when the ALJ's order was issued, and thus entitled to the FY 2007 maximum compensation rate. *Id.* at 18-20.

5. The court of appeals affirmed in relevant part. Pet. App. 1-13. The court noted that the Act uses the verb "award" in two different ways: as either "[t]o give or assign by sentence or judicial determination," *id.* at 6 (quoting *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2526 (2010) (citation omitted)) or "to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order," *ibid.* The court cited several examples of the Act's use of the word "award" that had the latter meaning. See *id.* at 6-8 (citing 33 U.S.C. 908(c)(22) (defining the "award" for loss of specified body parts, which must be paid even absent a formal compensation order); 908(c)(20) (requiring compensation to be "awarded" for disfigurement without a formal compensation order); 910(h)(1) (using "awarded compensation" and "entitled" to compensation to mean the same thing); 933(b) (defining award, for purposes of that subsection only, as a compensation order)). The court held that Section 906(c) used the word "awarded" in that same sense, concluding that an employee is "newly

awarded" compensation when he first becomes disabled and entitled to benefits, whether or not a formal compensation order is ultimately entered. Pet. App. 7.

Reading Section 906(c) "with a view to [its] place in the overall statutory scheme," the court of appeals concluded that its interpretation of the section "accords with the structure of the [Longshore Act], which identifies the time of injury as the appropriate marker for other calculations relating to compensation"—including determinations under Section 910 of the employee's average weekly wage, "the starting point for determining compensation." Pet. App. 8 (internal citation omitted). "To apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled," the Court reasoned, "would be to depart from the Act's pattern of basing calculations on the time of injury." *Id.* at 8-9.

The court also noted that making the date of a formal compensation order dispositive would produce "inequitable results." Pet. App. 9 n.1. "Two claimants injured on the same day could be entitled to different amounts of compensation depending on when their awards are entered." *Ibid.* The court rejected petitioner's contention that the possibility of a higher maximum compensation rate for employees with later-filed compensation orders would "encourage[] employers to expedite administrative proceedings rather than delay the process." *Ibid.* The court pointed out that the Act includes other provisions expressly designed to discourage such conduct. See *ibid.* (citing 33 U.S.C. 914(e) (imposing additional payment obligation when employer that does not

file notice controverting liability fails to pay compensation due without an award)).[7]

SUMMARY OF ARGUMENT

The national average weekly wage in effect at the time of an employee's disabling injury—not the one in effect when a formal administrative compensation order may be later entered—serves as the basis for calculating the employee's maximum benefit level under the Longshore Act.

1. The Longshore Act takes "the average weekly wage of the injured employee at the time of the injury * * * as the basis upon which to compute compensation," 33 U.S.C. 910, and sets compensation for total disability at two-thirds of that figure, 33 U.S.C. 908(a)-(b). The Act caps benefits, however, at 200% of the "applicable national average weekly wage," 33 U.S.C. 906(b)(1), and provides that the calculation of that average for a fiscal year "shall apply to employees or survivors * * * newly awarded compensation during such period," 33 U.S.C. 906(c).

Examined in isolation, the word "awarded" is ambiguous. It can mean either granted by adjudicatory order

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[7] Based on Section 906(c)'s "currently receiving" provision, the court of appeals held that the FY 2005 maximum rate applied to the compensation for permanent total disability to which petitioner was entitled from July 12, 2005, to September 30, 2005, and that the FY 2006 maximum rate applied to the period from October 1, 2005, to October 9, 2005. See Pet. App. 11-12 & n.2; 33 U.S.C. 906(c). Petitioner sought review of that question as well, contending that the "currently receiving" provision of Section 906(c) made the FY 2007 maximum rate applicable because that was the fiscal year in which he was ultimately paid benefits for those earlier periods. See Pet. ii, 21-22. This Court's order granting certiorari, however, limited review to his first question presented (on the "newly awarded" clause), see 132 S. Ct. 71; Pet. ii.

or simply bestowed upon. Different provisions of the Longshore Act use the word "award" in each sense. While the Act sometimes uses "award" to mean provide in an administrative compensation order, it also frequently uses the word to refer to payment of compensation required by operation of the Act itself, even absent a compensation order. It is thus necessary to examine the context of each provision that uses the term to determine which meaning Congress intended. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341-344 (1997).

The statutory context and role of the maximum compensation level in the statutory scheme establish that an employee is "newly awarded compensation" within the meaning of Section 906(c) when he is awarded compensation "by force of the Act," *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 456 (1947)—at the time of a disabling injury. That construction of Section 906(c) harmonizes it with two fundamental features of the Longshore Act: the calculation of initial benefit levels based on circumstances at the time of disabling injury and the requirement that employers pay disabled workers without a compensation order.

Section 906 places a ceiling on compensation levels that are calculated based on an employee's wages at the time of a disabling injury. See 33 U.S.C. 910; 33 U.S.C. 906. The national average wage level used to calculate that ceiling logically should be taken from the same time period. Moreover, most employees are not subject to the maximum benefit levels established by Section 906, and they unquestionably have their wages calculated based entirely on circumstances existing at the time of injury. See 33 U.S.C. 910. There is no reason to think Congress would have wanted the arbitrary date of a compensation order to serve as the basis for benefit cal-

culations in the relatively small number of cases, like this one, that do implicate the statutory maximum.

Interpreting Section 906(c) to make applicable the national average weekly wage from the year of a disabling injury, rather than the year of a compensation order, also harmonizes that provision with the Act's requirement that employers pay compensation within 14 days of notice of injury and "without an award." 33 U.S.C. 914(a) and (b). It does not make sense to read Section 906(c) as making applicable the national average weekly wage for the year in which a compensation order may later be issued, given that the Act requires compensation payments to be made without such an order.

Indeed, in the many Longshore Act cases in which employers immediately pay compensation as required by the statute, no compensation order is ever entered. In such cases, a rule requiring application of the national average weekly wage from the year a compensation order issued would be impossible to apply. And even in cases in which a compensation order does ultimately issue, that event can take place years after an employer is required to start compensation. Under petitioner's view of the Act, such situations would make retroactively applicable the national average weekly wage from the year of the compensation order, thus penalizing an employer that began paying compensation just after an injury for having failed to divine when in the future a compensation order might issue and what the national average weekly wage would be at that future time.

Petitioner's response to this problem is to suggest that compensation orders be promptly entered in every Longshore Act case. See Pet. Br. 43. That would upend decades of settled practice under the Act because "many pending claims are amicably settled through voluntary

payments without the necessity of a formal order." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975). Indeed, when the employer begins prompt payment of compensation and there is no dispute with the employee, the Act does not even require the employee to file a claim, which makes Section 919—the provision on which petitioner relies for his argument that compensation orders are mandatory—inapplicable. See 33 U.S.C. 919.

Petitioner also contends that giving employees the benefit of the (higher) national average weekly wage applicable at the time of a compensation order, rather than at the time of the disabling injury, would encourage employers to accede to compensation orders quickly. As noted, however, compensation orders are not required, and, in any event, using a higher national average weekly wage as a remedy for delay would be both under- and over inclusive. That remedy would provide no help to the majority of workers who are not subject to the statutory maximum at all, while at the same time providing a windfall to employees whose compensation orders issue in a fiscal year later than their injury through no fault of the employer. Instead, providing interest on delayed compensation is the sensible way the Act addresses compensation delay.

Application of the national average weekly wage rate for the year in which the injury occurred is also confirmed by the statutory evolution of the Longshore Act and the legislative history of the 1972 and 1984 amendments to the Act concerning Section 906.

2. Analysis following the normal rules of statutory construction establishes that Section 906(c) makes applicable the national average weekly wage from the year of an employee's disabling injury, not that of a compensa-

tion order. To the extent the statute is ambiguous on this question, however, the Court should defer to the reasonable interpretation advanced by the Director, OWCP, who has been delegated the authority to administer the Longshore Act. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). The Director has consistently articulated the position that the national average weekly wage at the time of injury applies, and he has done so as a participant in formal agency adjudications and in his day-to-day administration of benefits under the Act. That position is, at the least, a reasonable interpretation of the statute, and it is entitled to deference.

ARGUMENT

The Longshore Act requires employers to begin compensation payments to a disabled worker "promptly" after the injury, without entry of a formal compensation order, 33 U.S.C. 914(a), and it consistently bases benefit-level calculations on circumstances that existed at the time of injury, see, *e.g.*, 33 U.S.C. 910. Petitioner's contention—that maximum benefit levels should be calculated based on circumstances at the time an administrative compensation order is entered, potentially years after the disabling injury—is irreconcilable with both of those structural features of the Act. Petitioner's interpretation of the Act would also render its maximum and minimum benefit levels impossible to calculate in large numbers of cases in which the employer pays benefits under the compulsion of the Act itself rather than awaiting a compensation order that reduces that statutory obligation to an administrative judgment. The Court should interpret Section 906(c) consistently with the longstanding interpretation of the Director, OWCP,

as making applicable the national average weekly wage at the time of the disabling injury, not at the time of any formal compensation order that may later happen to be entered.

I. THE APPLICABLE NATIONAL AVERAGE WEEKLY WAGE FOR PURPOSES OF CALCULATING BENEFITS UNDER THE LONGSHORE ACT IS THAT IN FORCE AT THE TIME OF A DISABLING INJURY

A. Section 906(c) Makes Applicable The National Average Weekly Wage In Force At The Time Compensation Is Mandated By Operation Of Law

The Longshore Act defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). That is "in essence an economic, not a medical, concept." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). The Act has from the beginning provided that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." 33 U.S.C. 910; see 33 U.S.C. 910 (Supp. I 1928) (same). Accordingly, "in order to calculate benefits under the Act, one must be able to identify the appropriate time of injury." *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 164 n.13 (1993). And the employer must make that determination—and all benefit calculations that flow from it—very quickly, because the Act requires that "[c]ompensation * * * be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. 914(a); see 33 U.S.C. 914(b) (first payment due 14 days after employer receives notice of injury); 33 U.S.C. 914(e) (extra payment

of ten percent due for not meeting payment deadline, unless employer has filed notice with district director that it is controverting liability).

In cases of total disability, the employee's default benefit level is two-thirds of his own average weekly wage at the time of injury. See 33 U.S.C. 908(a) and (b). That benefit level, however, is capped at "an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary [of Labor]." 33 U.S.C. 906(b)(1). The Secretary's calculation "with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." 33 U.S.C. 906(c).

In petitioner's view, there is only one permissible meaning of the phrase "those newly awarded compensation" in Section 906(c)—it means those who newly received a formal compensation order, thus making issuance of such an order the controlling event for determining which national average weekly wage applies. *E.g.*, Pet. Br. 15; accord *Boroski* v. *DynCorp Int'l*, No. 11-10033, 2011 WL 5555686, at *8-*17 (11th Cir. Nov. 16, 2011); *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997). That is incorrect. When read in light of the Act as a whole and the role that maximum and minimum benefit levels play in the larger scheme, the phrase "newly awarded compensation" is best read to mean newly due "by force of the Act" itself at the time of a disabling injury, *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 456 (1947), not an administrative compensation order.

1. The Longshore Act often uses "award" to mean entitlement to benefits by operation of law, not pursuant to a compensation order

The verb "award" can mean to formally grant by judicial decree (as petitioner would have it interpreted in Section 906(c) and throughout the Act), but it also can simply mean to confer upon. See, *e.g.*, *Webster's New International Dictionary* 192 (2d ed. 1958) ("[t]o give by sentence or judicial determination" *and* "[t]o confer or bestow upon"); *Black's Law Dictionary* 174 (rev. 4th ed. 1968) ("[t]o give or assign by * * * judicial determination" *and* "[t]o grant, concede, or adjudge to"); see also *American Heritage Dictionary of the English Language* 124 (4th ed. 2006) ("[t]o grant as merited or due" and "[t]o give as legally due").[8]

As demonstrated below, Congress used the word "award" (both as a noun and as a verb) in both senses in the Longshore Act. It is therefore necessary to consider the statutory context to determine which meaning Congress intended in a particular provision. For that reason, this case is analogous to *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997). That case presented the question whether the term "employees" in the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 was

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[8] Amicus American Association for Justice notes (Br. 10-11) that the Court in *Astrue* v. *Ratliff*, 130 S. Ct. 2521 (2010), explained that "[t]he transitive verb 'award' has a settled meaning *in the litigation context*: It means '[t]o give or assign *by* sentence or judicial determination.'" *Id.* at 2526 (quoting *Black's Law Dictionary* 125 (5th ed. 1979)) (first emphasis added). That is true "in the litigation context." *Ibid.* But, as noted in the text, the word can have a different meaning in other contexts, and here, a fundamental feature of the Longshore Act is the employer's obligation to pay benefits (and the employee's entitlement to receive them) *without* litigation. See 33 U.S.C. 914(a).

limited to "current employees" or also included former employees. *Id.* at 339. The Court observed that different sections of Title VII used the term "employee" in each distinct sense; "employee" accordingly did not have "the same meaning in all * * * sections and in all * * * contexts." See *id.* at 342-343. "Once it is established that the term 'employees' includes former employees in some sections, but not in others," the Court reasoned, "the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Id.* at 343-344.

The same mode of analysis is called for here. The Act at times uses the word "award" to mean compensation order. See, *e.g.*, 33 U.S.C. 914(a) ("Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."). In other parts of the statute, however, context demonstrates that Congress used "award" to mean a grant of compensation by operation of the Act itself. Some of those provisions are described below:

Section 908(d)(1). As a supplement to its other forms of compensation, the Act provides for additional payments for employees who suffer certain loss-of-use injuries on the job. See 33 U.S.C. 908(c)(1)-(19), (22). For example, an employee who loses an arm as the result of an on-the-job accident is entitled to a payment of two-thirds of his average weekly wage for 312 weeks. See 33 U.S.C. 908(c)(1). The Act provides that if an employee who is receiving such loss-of-use compensation "dies from causes other than the injury, the total amount of the *award* unpaid at the time of death shall be

payable to or for the benefit of his survivors." 33 U.S.C. 908(d)(1) (emphasis added). Because employees often receive compensation under the Longshore Act without a formal compensation order, see 33 U.S.C. 914(a); pp. 9-10, *supra*, many employees who received benefits under Section 908(d)(1) will not have had an "award" in that sense. If petitioner's reading of the Act were correct, such an employee's survivors would not be entitled to any compensation under Section 908(d)(1) if the employee died. There is no reason to think that Congress intended such an arbitrary result.

Section 908(c). Section 908(c) of the Act also "uses the terms 'award' and 'awarded' to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order." Pet. App. 6. For example, that provision (titled "Compensation for disability") provides that "compensation not to exceed $7,500 shall be *awarded* for serious disfigurement of the face, head, or neck." 33 U.S.C. 908(c)(20) (emphasis added); see also 33 U.S.C. 908(c)(22) ("the *award* of compensation" for loss of multiple body parts "shall be for the loss of, or loss of use of, each such member or part * * *, which awards shall run consecutively") (emphasis added). As the court of appeals noted, "[b]y use of the term 'awarded'" in those subsections, "Congress could not have meant 'assigned by formal order in the course of adjudication,' given that employers are obligated to pay such compensation regardless of whether an employee files an administrative claim." Pet. App. 6; see 33 U.S.C. 914(a).

Petitioner speculates that "[t]hose references merely contemplate that *awards will be entered*." Pet. Br. 30. But, as noted above, the statute expressly contemplates that compensation will be paid "without an award" in the

form of a formal compensation order, 33 U.S.C. 914(a); indeed, the statute mandates such payments. Unless the employer controverts liability, it is thus legally obligated to pay $7500 to an employee who suffered a "serious disfigurement of the face, head, or neck," whether or not the employee has received a compensation order. See *ibid.*; 33 U.S.C. 908(c)(20).

Section 910(h)(1). Section 910(h)(1) provides another example of the Act's use of "the term 'awarded' to refer to an employee's entitlement to compensation, irrespective of a formal compensation order." Pet. App. 7. That provision, which was added by the 1972 amendments to the Act, authorized adjustments to the "compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to" the 1972 amendments to the Act. 33 U.S.C. 910(h)(1). In general, it provided that those individuals would have the post-amendment national average weekly wage substituted for their own average weekly wage and would then have their compensation calculated as if their injury had occurred in 1972. See *ibid.*; see n.2, *supra*. The Act provided an alternative method of adjustment, however, "where such an employee or his survivor *was awarded* compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this chapter at the time of the injury." 33 U.S.C. 910(h)(1) (emphasis added). Those individuals had their benefits calculated based on their own average weekly wage at the time of the injury, but would receive a percentage increase based on inflation. See *ibid.*

If petitioner were correct that "awarded" always means entry of a formal compensation order, then the applicability of the alternative method of adjustment in

Section 910(h)(1) would be strangely incomplete. It would arbitrarily distinguish between employees based on whether or not they had received benefits under a formal compensation order. If so, they would be subject to the alternative method of calculation. If not, they would receive a higher compensation rate by having their benefits calculated as if the relevant injury had occurred in 1972.

We are not aware of any decision (and petitioner cites none) making such a distinction when interpreting Section 910(h)(1), and the provision's legislative history makes clear that it was intended to apply to all individuals who "had received less than the maximum rate of compensation," S. Rep. No. 1125, 92d Cong., 2d Sess. 22 (1972), with no suggestion that it mattered whether the payment obligation was embodied in a compensation order. That interpretation is confirmed by the final sentence of Section 910(h)(1), which provides that "[w]here such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period." 33 U.S.C. 910(h)(1). That sentence—which does not use the word "award" at all—makes clear that what matters is the time of "injury," not whether the obligation to provide compensation for it arose from a compensation order as well as the Act itself.

Section 933(b). Finally, Section 933(b) of the Act provides another example of a provision that precludes a conclusion that the Act invariably uses the word "award" to mean compensation order. That provision states that, under certain circumstances, "[a]cceptance of [Longshore Act] compensation under an award *in a compensation order* filed by the deputy commissioner,

an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against" a third party for the injury. 33 U.S.C. 933(b) (emphasis added). That provision is triggered by only one particular type of "award": an "award in a compensation order." *Ibid.* If "award" in the Longshore Act always means "compensation order," as petitioner contends (Pet. Br. 22), it would have been unnecessary for Congress to include the phrase "in a compensation order" in Section 933(b). Congress's decision to do so reflects its understanding that there can exist awards *not* in a compensation order, *i.e.*, when an employer pays benefits after a disabling injury because of its obligation to do so directly under the Act itself, see 33 U.S.C. 914(a).

This reading of Section 933(b) is confirmed by this Court's decision in *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529 (1983) (*Pallas Shipping*). That case presented the question "whether a longshoreman's acceptance of voluntary compensation payments," *i.e.*, without a compensation order, "gives rise to an assignment" under Section 933(b). *Id.* at 531. The Court answered that question in the negative:

> Section [933(b)] triggers an assignment of an injured longshoreman's cause of action against a third party only after he has accepted compensation "under an award *in a compensation order* filed by the deputy commissioner or Board." (Emphasis added.) The term 'compensation order' in the [Longshore Act] refers specifically to an administrative award of compensation following proceedings with respect to the claim. 33 U.S.C. § 919(e). In this case, no adminis-

> trative proceedings ever took place, and no award was ever ordered by the Deputy Commissioner.

Id. at 534 (footnote omitted). Instead, the compensation at issue in *Pallas Shipping* was provided by the employer as required by operation of the Act itself, and therefore did not result in assignment of any cause of action against a third party.

Congress subsequently amended Section 933(b) in 1984 expressly to provide that "[f]or the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board." Longshore and Harbor Workers' Compensation Act Amendments of 1984 (Act of 1984), Pub. L. No. 98-426, § 21(a), 98 Stat. 1652. As the court of appeals noted, this provision "contemplates that the meaning of the term 'award' in other sections is not limited to a formal compensation order." Pet. App. 8. "Unless 'award' is used in other sections to mean something broader than a formal compensation order, the specific definition in section [933(b)] would be unnecessary." *Ibid.*

Petitioner does not attempt to provide independent significance to the new definitional provision in Section 933(b), instead acknowledging that, on his reading of the statute, it was "unnecessary" because the term award "had the unmistakable meaning, even before that sentence was added and *throughout* the Act, that the added sentence sought to nail down." Pet. Br. 29. That contention disregards the "cardinal principle of statutory construction that [the courts] must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (quotation marks and internal citation omitted); see *Board of Trs. of Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*,

131 S. Ct. 2188, 2196 (2011) (relying on this canon to reject a construction that would have rendered an element of a definitional provision "surplusage") (internal citation omitted). Moreover, it is telling that the new definitional provision in Section 933(b) (which congressional conferees noted was "in accord with the decision in *Pallas Shipping*," H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 36 (1984)) ensured that the specialized meaning of "award" *Pallas Shipping* gave to that term would be limited to "this subsection," *i.e.*, Section 933(b), and not the entire Act, as petitioner contends should be the case.

2. Like other parts of the Act, Section 906(c) contemplates an "award" that is not the result of a compensation order

Section 906(c) "must be read in * * * context and with a view to [its] place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); see *Reno* v. *Koray*, 515 U.S. 50, 62 (1995) (rejecting interpretation of statutory provision that was "plausible * * * if the phrase [was] read in isolation" but that did "not carry the day" in light of further "textual and historical analysis"); *Robinson*, 519 U.S. at 343-344. Read in the context of the broader statutory scheme, Section 906(c), like the provisions discussed above, cannot sensibly be read to use "award" to mean "issue a compensation order." Instead, the provision contemplates that an employee is "newly awarded compensation" by force of the Act itself once he suffers a disabling injury. That is consistent with how this Court has described Longshore Act benefits, see *American Stevedores*, 330 U.S. at 456 ("The

employee thus receives compensation payments quite soon after his injury by force of the Act."), and payments made under other workers' compensation schemes, see *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 500 (1939) (referring to "provisions of the California [workers' compensation] statute awarding compensation for injuries to an employee occurring within its borders").

a. As an initial matter, the Director's interpretation is the only one consistent with the Act's singular focus on the time of disabling injury as the basis for initial benefits calculations. See Pet. App. 8.[9] The Act defines

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[9] "[I]n most cases of traumatic injury," like the one in this case, "the time of injury will coincide almost exactly with the time the worker is disabled." *Johnson* v. *Director, OWCP*, 911 F.2d 247, 249 (9th Cir. 1990) (citation omitted), cert. denied, 499 U.S. 959 (1991); see 33 U.S.C. 902(2) (statutory definition of injury distinguishing between "accidental injury or death" and "occupational disease or infection"); 33 U.S.C. 910(i) (special rules for occupational disease cases). There was actually a slight lag in this case—petitioner was injured on February 24, 2002, but continued working until March 11, 2002, Pet. App. 4—but both injury and onset of disability occurred in the same fiscal year. The court of appeals thus did not need to determine whether the national average weekly wage applicable at the time of the accident or at the time of subsequent onset of disability applied, and it used the two times interchangeably in articulating its rule. See, *e.g.*, *id.* at 8 ("Our holding that an employee is 'newly awarded' compensation when he first becomes disabled accords with the structure of the [Act], which identifies the time of injury as the appropriate marker for other calculations relating to compensation.").

Given that, just as in the typical traumatic injury case, the injury and onset of disability here occurred in the same fiscal year, there is no occasion for this Court to decide that question either. In any event, it is the position of the Director that in a traumatic injury case in which, unlike here, the accident and onset of disability were in different fiscal years, the national average weekly wage for the year of onset would

"disability"—a foundational term underlying the entire benefit scheme—as "incapacity because of injury to earn the wages which the employee was receiving *at the time of injury*." 33 U.S.C. 902(10) (emphasis added). Accordingly, "the average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation." 33 U.S.C. 910 (emphasis added).

Section 906(c) in turn establishes a floor and a ceiling for compensation levels that are initially calculated based on the employee's wages at the time of the disabling injury. That provision is thus logically read to apply to an initial benefit calculation the maximum and minimum benefit levels that are likewise based on circumstances that existed at the time of the injury. Conversely, there is no apparent justification for determining a basic compensation rate based on an employee's average weekly wage at the time of his disabling injury, but capping that initial compensation based on a national average weekly wage from years later. It seems even less likely in light of the fact that the "applicable national average weekly wage" increases each year, while the employee's own average weekly wage does not, meaning petitioner's interpretation would require comparison not only of average wages from different years, but of a fixed sum (the employee's average weekly wage) to one that changes annually (the national average weekly wage).[10]

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apply because that is when the employee is "newly awarded compensation" by force of the Act, *i.e.*, when the disability commenced.

[10] Because of Section 906(c)'s "currently receiving" provision, the maximum compensation for permanent total disability and death benefits will increase each year to reflect increases in the national average weekly wage. 33 U.S.C. 906(c); see 33 U.S.C. 910(f). That increase, akin

Interpreting Section 906(c) to make applicable the national average weekly wage at the time of a disabling injury also harmonizes that provision with the way the Act applies to employees whose average weekly wages are not high enough for Section 906's maximum rate to apply. Regardless of the nature or extent of such a worker's disability, or when—or even if—the worker later receives a compensation order, the amount of compensation is based on the worker's average weekly wage at the time of the injury. See 33 U.S.C. 910; 33 U.S.C. 908(a), (b) and (c). For most workers, that compensation rate does not change over time. There is an exception for claimants receiving compensation for death or permanent total disability, who are entitled to annual increases tied to the increase in the national average weekly wage. 33 U.S.C. 910(f). But whether entitled to annual increases under Section 910(f) or not, no claimant who is unaffected by Section 906's maximum rate receives a higher *initial* compensation rate based on whether or when a compensation order is issued.

The Director's interpretation of the Act, as adopted by the court of appeals, gives this same treatment to claimants who *are* affected by Section 906's maximum rate: they initially receive the maximum rate in effect at the time of the injury, and those receiving compensation for death or permanent total disability are entitled to prospective annual increases tied to the national average weekly wage. See 33 U.S.C. 906(c) (applying a given fiscal year's determination to any claimant "currently receiving compensation for permanent total disability or death"). But, as with claimants not at the maximum

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to a cost-of-living adjustment, is prospective and does not affect the initial benefit calculation. See Pet. App. 10-12.

rate, no claimant is entitled to a higher *initial* maximum rate based on the date of any compensation order that may later be entered.

Under petitioner's interpretation of the Act, by contrast, an employee's compensation would often increase due to the mere fortuity of the timing of a compensation order, a matter that is often beyond the control of both employee and employer. This case illustrates the point. The hearing before the ALJ took place in January 2006, but the ALJ did not issue the compensation order until October 12, 2006. See Pet. App. 33-34. For that reason, petitioner contends that the FY 2007 national average wage should apply. But if the ALJ had issued his order a mere 13 days earlier, petitioner's theory would call for application of the FY 2006 average. Basing calculations on circumstances existing at the time of a disabling injury prevents benefit levels from changing based on mere administrative happenstance.[11]

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[11] Congress's understanding that the time of disabling injury is to be the trigger for benefits calculations under the Act is reflected in its practice of adopting special, statutorily defined times of injury to make benefit adjustments. As discussed above, Congress in 1972 adjusted benefit levels for previously disabled employees by providing them with a special, post-1972 "time of injury." See n.2, *supra*. Congress followed the same route when it addressed benefits for employees disabled by occupational diseases. See 33 U.S.C. 910(d)(2) and (i); *Bath Iron Works Corp.*, 506 U.S. at 157 (describing provisions). The Act provides that in cases of "occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or * * * should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. 910(i). When that "time of injury" occurs within a year of an employee's retirement, then his "average weekly wage" for purposes of calculating benefit levels is the average weekly wage for the year immediately preceding his retirement. 33 U.S.C. 910(d)(2)(A). Congress went on expressly to link the national

b. Interpreting Section 906(c)'s use of the phrase "newly awarded compensation" to mean newly awarded compensation by force of the Act itself, rather than by an administrative compensation order, also harmonizes the provision with the Act's requirement that employers pay compensation absent compensation orders. See 33 U.S.C. 914(a) ("Compensation under this Act shall be paid periodically, promptly, and * * * without an award, except where liability to pay compensation is controverted by the employer."). Because the Act mandates that "compensation payments" be paid "quite soon after [an] injury by force of the Act" itself, *American Stevedores*, 330 U.S. at 456 (citing 33 U.S.C. 914), it is logical to interpret Section 906(c) as contemplating payments of the same nature.

Petitioner's interpretation of Section 906(c), by contrast, would render it impossible to apply in the many Longshore Act cases in which the employer pays compensation pursuant to Section 914(a), with no compensation order ever being issued. If the applicable maximum benefit level were calculated based on the date a compensation order was entered, as petitioner contends should be the case, an employer that begins providing benefits without such an order (as it is required to do by Section 914(a)) would not know what maximum to apply.

Consider a highly compensated worker injured, like petitioner, in FY 2002. As required by 33 U.S.C. 914(b),

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average weekly wage with the (special statutorily-defined) time of injury in occupational disease cases when it provided that if the "time of injury" occurs more than a year after retirement, the employee's "average weekly wage" for purposes of benefit calculations "shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable *at the time of the injury*." 33 U.S.C. 910(d)(2)(B) (emphasis added).

the employer pays compensation within 14 days, and does so at the FY 2002 maximum rate. This situation continues until 2005, when a dispute develops. Litigation ensues and the worker prevails, resulting in a formal compensation order in FY 2007. On petitioner's interpretation of Section 906(c), the employer is required to pay benefits at the FY 2007 maximum rate—not only going forward, but also retroactively to the date of disability, with interest on the difference between the total sums payable under the FY 2002 and FY 2007 maximums.

Indeed, under petitioner's understanding of the Act, this same hypothetical employee would apparently be entitled to the same increase in his maximum benefit level even if he *lost* his later dispute with the employer. If the ALJ sided with the employer in the dispute and decided that the employee was not entitled to a higher rate of compensation, the ALJ would still embody that decision in a "compensation order" because, under the Act, that term means not only an "order" "making the award" but also an "order rejecting the [employee's] claim" and ordering that payment of compensation be maintained at current levels. 33 U.S.C. 919(e). Because the first and only "compensation order" in that situation would be issued in FY 2007, it appears that, under petitioner's view, the employee who litigated and lost would nonetheless be entitled to a retroactive increase in benefits to the FY 2007 maximum level.

Petitioner contends that such problems would not arise because, in his view, a compensation order should be entered in every case just after the start of benefit payments. See Pet. Br. 43. Petitioner's solution to the problem created by his interpretation of Section 906(c) would upend decades of settled practice under the Long-

shore Act, under which many employers pay—and employees receive—compensation without either party ever obtaining a formal compensation order. "[I]n practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order by the deputy commissioner." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975); see *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 498 (1992) (Blackmun, J., dissenting) ("[T]he Act presumes that employers, as a rule, will promptly recognize their [Longshore Act] obligations and commence payments immediately, without the need for a formal award.") (*Cowart*). Even petitioner acknowledges that "district directors rarely issue compensation orders on uncontested claims in which the employer is making payments." Pet. Br. 43.

Notwithstanding this long-settled practice, petitioner appears to contend (Pet. Br. 29 n.16, 43) that entry of compensation orders is compelled by the Act in every case in which compensation is paid. That is incorrect. In arguing that compensation orders are mandatory in all cases, petitioner relies on the final sentence of Section 919(c), which provides that if no hearing is ordered within 20 days after notice that a claim is filed, the district director "shall, by order, reject the claim or make an award in respect of the claim." 33 U.S.C. 919(c). Section 919, however, is titled "Procedure in Respect of *Claims*," and addresses the actions to be taken by the district director after "a claim for compensation [is] filed." 33 U.S.C. 919(a) (emphasis added). But if an employer begins paying compensation within 14 days of notice of an injury, as required by Section 914(b), the employee is not required—and if satisfied with payment, has no need—to file a claim. In that event, Section

919—including its Subsection (c), on which petitioner relies—is not triggered.

The Act's limitations provision recognizes this feature of the Act. That provision generally requires a claim to be filed within a year of the injury or death, but it also provides that "[i]f payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment." 33 U.S.C. 913(a); see 20 C.F.R. 702.221(a) (same); see also 33 U.S.C. 919(a) (cross-referencing Section 913). Accordingly, an employer could pay without a compensation order for years, and if no dispute leads the employer to cease payments—*i.e.*, there never is a "last payment"—then Section 913 contemplates that no claim need ever be filed. Unless a claim is filed, Section 919 simply has no application, and Subsection (c) could not require the issuance of an order.

Moreover, Department of Labor regulations provide that a formal compensation order is not required even when an employee elects to file a claim. In "the vast majority of cases" in which an employer has disputed a claim or an employee has contested some benefit-related action by the employer, "the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law." 20 C.F.R. 702.301. "Such problems seldom require resolution through formal hearings," and "district directors are empowered to amicably and promptly resolve such problems by informal procedures." *Ibid.*; see 20 C.F.R. 31.8 (1972) (requiring prehearing conferences to try to "amicably * * * dispose of controversies wherever possible"). When agreement is reached through such informal procedures, the district director can "embody the

agreement in a memorandum *or* * * * issue a formal compensation order." 20 C.F.R. 702.315(a) (emphasis added); see *ibid.* (district director is required to file a formal compensation order only if a party requests it).

As a background practice involving legal disputes generally, parties often resolve the dispute informally or through a settlement agreement, without entry of a judgment or order by a tribunal. There is no reason to conclude that Congress intended to foreclose such informal resolution of disputes under the Longshore Act, especially where, as is the case under governing regulations, discussions between employee and employer occur under the auspices of the district director, and the district director (or ALJ) must approve any resolution by means of a settlement agreement or memorandum, 20 C.F.R. 702.241-701.243, 702.315(a). Cf. *United States* v. *Mezzanatto*, 513 U.S. 196, 200-204 (1995) (interpreting rule of evidence in light of background legal practices). To the contrary, under the Longshore Act, informal resolution of a dispute implements in an amicable manner the employer's statutory obligation to pay compensation promptly, whether or not a formal compensation order is entered, see 33 U.S.C. 914(a), and thus places the parties in the same position they would have occupied if no dispute had ever arisen. That informal dispute resolution process also reasonably implements the provisions of Section 919 establishing procedures for resolving a claim, including the authority of a district director under Section 919(c) to "make or cause to be made such investigations as he considers necessary in respect of the claim" before ordering a hearing. 33 U.S.C. 919(c). Section 919(c) cannot reasonably be read to require a district director to issue a formal compensation order even

if the parties resolve their difference informally and no party requests a compensation order.

c. Petitioner's interpretation of Section 906(c) should also be rejected because there is no indication Congress intended the arbitrary distinctions in compensation levels between similarly-situated employees that flow from it. See Pet. App. 9 n.1. Compare petitioner with a similarly situated worker who suffered the same injury on the same day, but who never has occasion to file a claim and obtain a compensation order. The only difference is that the hypothetical worker's employer pays compensation at the FY 2002 rate, $966.08 per week, from the date of the injury. Petitioner, on the other hand, secures a compensation order in 2007, which, on his reading of Section 906(c), entitled him, retroactively to FY 2002, to the $1114.44 maximum rate in effect for FY 2007. As a result, even though both employees are receiving compensation for the same disability that prevented them from earning the same wages during the same time period, petitioner would receive substantially higher benefits on his understanding of the Act.

Petitioner contends that these varying benefit rates are necessary to compensate claimants for delayed receipt of compensation. Pet. Br. 42. There are several flaws in that contention. First, petitioner's interpretation does not limit use of the date-of-order maximum to cases in which there has been a delay in payment. As discussed above, on petitioner's view he would be entitled to the FY 2007 maximum rate retroactively back to 2002, even if his employer had promptly paid weekly benefits at the FY 2002 maximum rate since the day he was injured but a compensation order was nonetheless entered at a later date. Second, compensation can be

delayed in any case, not just the relatively few cases involving the maximum rate, making Section 906(c) a poor vehicle to remedy that problem. Third, it would be a vehicle available only to the highest-paid and lowest-paid claimants (those subject to maximum or minimum benefit levels), not to the many employees in between for whom delay might cause hardship. Finally, there is no need to resort to petitioner's interpretation of Section 906(c) to compensate employees for delay because a broadly applicable and calibrated tool is available: the payment of interest. See *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1059 (9th Cir. 1998) (interest accrues from the date benefits became due, not from the date of the ALJ's judge's award); *Sea-Land Serv., Inc.* v. *Barry*, 41 F.3d 903, 910 (3d Cir. 1994); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Strachan Shipping Co.* v. *Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), cert. denied, 406 U.S. 958 (1972); *Quick* v. *Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Indeed, petitioner received interest here. Pet. App. 108.

d. Contrary to petitioner's argument (Pet. 21), there is no conflict between the Director's interpretation of Section 906(c) and this Court's decision in *Cowart*, *supra*. *Cowart* involved Section 933 of the Act, which allows a "person entitled to compensation" under the Act to pursue claims against third parties responsible for injuries compensable under the Act without forgoing such compensation. See 33 U.S.C. 933(a). Section 933(g), however, provides that if the "person entitled to compensation" settles with a third party for less than the amount of compensation to which he is entitled, without first receiving written approval from the liable employer, all future benefits are forfeited. 33 U.S.C.

933(g)(1)-(2). The Court held that an employee was a "person entitled to compensation" as soon as he suffered an injury giving him a right to compensation under the Act, regardless of whether the employer had paid compensation or was subject to a compensation order. *Cowart*, 505 U.S. at 477. The Court simply held that issuance of a formal compensation order is not the only way to become a "person entitled to compensation" for purposes of Section 933(g). Because that provision does not contain the word "award," the Court in *Cowart* had no occasion to interpret that term, much less hold that compensation cannot be awarded by force of the Act.

e. The Board in *Reposky* v. *International Transportation Services*, 40 Ben. Rev. Bd. Serv. (MB) 65, 76 (Oct. 20, 2006), reached the same result as the court of appeals by focusing on Section 906(c)'s use of the term "during" rather than the term "awarded." See Pet. App. 19-20. It accepted the Director's interpretation that the phrase "newly awarded compensation during such period," 33 U.S.C. 906(c), means "newly awarded compensation *for* such period" rather than petitioner's preferred interpretation, "newly awarded compensation *in* such period." *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 76. Like the court of appeals' interpretation of the Act, the Board's reading makes the "period" in which a disabling injury occurs (not that in which a compensation order issues) dispositive.

Section 908 of the Act uses the word "during" in that same sense. That section provides, in numerous places, that compensation is to be paid "during the continuance" of the relevant disability. 33 U.S.C. 908(a), (b), (c)(21), (23) and (e). This language clearly does not mean that compensation must be paid, or may only be paid, *in* the actual period of disability. Rather, it means that com-

pensation is payable *for* the period of disability. That the compensation may be ordered at some date after the period of disability does not change the period for which—or the rate at which—that compensation is to be paid.[12]

3. The legislative history supports the Director's interpretation of Section 906(c)

The legislative history of the 1972 amendments to the Longshore Act supports the view that Congress did not intend the "newly awarded" provision of Section 906(c) to be based on the time of a formal compensation order, if one happens to be entered in the case. The Senate report identified workers newly awarded compensation under Section 906(c) as "those who begin receiving compensation for the first time during the period." S. Rep. No. 1125, 92d Cong., 2d Sess. 18 (1972). As noted previously, employees often "begin receiving compensation" (*ibid.*) in the absence of a formal compensation order. See 33 U.S.C. 914(a). Indeed, many employees never receive such an order. Accordingly, the committee's description of Section 906(c) is irreconcilable with petitioner's interpretation of that provision.

The legislative history of the 1984 amendments to Section 906 likewise supports the conclusion that it is the national average weekly wage rate at the time of injury that controls. After the 1972 amendments eliminated maximum and minimum rates fixed in the Act itself in favor of limits on disability benefits tied to the

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[12] Petitioner does not argue that Section 908 should be given a different reading, but does contend that "during" cannot mean "for" in Section 906(c) because "during" is an adverbial modifier of "awarded." Pet. Br. 21. He does not explain how this is grammatically different from Section 908, in which "during" is an adverbial modifier of "paid."

national average weekly wage as calculated by the Director, there was disagreement over whether Congress intended death benefits to be subject to any maximum rate. Resolving this conflict, the Court held that the maximum-rate formulas in Section 906(b)(1) applied only to compensation paid for disability, and not to compensation paid for death. *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 47 (1979).

In 1984, Congress amended Section 906(b)(1) to fill the gap identified by *Rasmussen* and apply the maximum rate to death benefits as well. Compare 33 U.S.C. 906(b)(1) ("Compensation for disability *or death* * * * shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage.") (emphasis added) with 33 U.S.C. 906(b)(1) (1982) ("[C]ompensation for disability shall not exceed * * * 200 per centum" of the national average weekly wage.). The Conference Committee explained that this amendment "impose[d] a cap on death benefits of 200% of the national average weekly wage, the same maximum applicable to disability cases. The conferees intend that the national average weekly wage subjected to the cap shall be the national average weekly wage applicable on the date of death." H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 28-29 (1984); see also H.R. Rep. No. 570, 98th Cong., 1st Sess. 8-9 (1983) ("[C]ompensation payments for death shall be limited to a maximum of 200% of the National Average Weekly Wage applicable on the date of death."); *id.* at 26 (same). Congress thus understood that it was applying the "same" maximum benefit levels to death that had previously applied to disability, and that those levels would be calculated based on the national average weekly wage in force at the time of death. It therefore necessarily understood that, in cases of dis-

ability, Section 906 rendered the average from the time of disabling injury applicable.

II. THE DIRECTOR'S INTERPRETATION OF THE LONGSHORE ACT, AS ARTICULATED IN FORMAL ADMINISTRATIVE PROCEEDINGS AND HIS ADMINISTRATION OF THE ACT, IS ENTITLED TO DEFERENCE

For the reasons given above, Section 906(c) is best read to refer to the national average weekly wage applicable at the time of an employee's disabling injury, not at the time of any compensation order that may later be entered. To the extent, however, that there is any ambiguity in the Act on that question, the Court should defer to the Director's reasonable interpretation of the statute he administers. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

Congress in the Longshore Act assigned the Secretary of Labor the "responsibility" of "supervising" and "administering" the "calculation of benefits and processing of claims" under the Act. *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 130-131 (1995). The Secretary has in turn delegated her responsibilities under the Act to the Director. See 20 C.F.R. 701.201; 74 Fed. Reg. 58,834 (Nov. 13, 2009).

There are several ways in which the Director interprets the Longshore Act in exercising his statutory duty to administer the Act. He may promulgate regulations. See 33 U.S.C. 939(a). He may "appear as a litigant before the relevant adjudicative branches of the Department of Labor, the ALJ, and the Benefits Review Board." *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 263 (1997); see 20 C.F.R. 702.333(b). And through district directors, he interprets and applies the Act on a daily basis when he resolves disputes infor-

mally, calculates benefits awards, and issues legally binding compensation orders. See 20 C.F.R. 702.301-703.315.

A regulation promulgated by the Director would clearly be entitled to *Chevron* deference; so too should the Director's authoritative interpretation of the Act when provided in formal agency adjudications, articulated in official guidance on the calculation of benefit levels, or used as his basis for making actual benefit calculations. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230-231 (2001) (notice-and-comment rulemaking is good indicator of entitlement to *Chevron* deference but "the want of that procedure * * * does not decide the [question]"); *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002) ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

The Director's interpretation of the Longshore Act in administrative proceedings "*is* agency action, not a *post hoc* rationalization of it." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). "Under these circumstances, the [Director's] litigating position before the [Department] is as much an exercise of delegated lawmaking powers as is the [Director's] promulgation of a [regulation]." *Ibid.*; accord *Gilliland* v. *E.J. Bartells Co.*, 270 F.3d 1259, 1262 (9th Cir. 2001) ("[T]he Director's interpretation of the [Longshore Act] is entitled to deference if it is contained either in a regulation or in the Director's litigation posi-

tion within an *agency* adjudication, so long as the interpretation is reasonable.").[13] But see *Boroski*, 2011 WL 5555686, at *6-*7.

As relevant here, the Director has long interpreted Section 906(c) to require application of the national average weekly wage in effect at the time of disabling injury, not at the time of any formal compensation order that may be entered later. He stated that position more than 30 years ago in an overview publication about the Longshore Act, outside the context of any litigation, see United States Dep't of Labor, Employment Standards Administration, OWCP, *Workers' Compensation Under the Longshoremen's Act* (1979), and, through the district directors, he has acted on that interpretation in his day-to-day administration of the Act, including in the informal resolution of disputes and in calculating benefit levels. In this case, the ALJ decided to apply the national average weekly wage from the time of injury, but in the administrative proceeding that led to the Eleventh Circuit's recent decision in *Boroski*, that determination was made by a district director. See 2011 WL 5555686, at *2.

Moreover, the Director successfully advocated adoption of his position by the Benefits Review Board in *Reposky*. See pp. 12-13, *supra*. The fact that the Director in *Reposky* advocated a different textual route to the same ultimate conclusion is of no import. To the extent there is ambiguity in Section 906(c), it inheres in the provision as a whole, and the Director in *Reposky* resolved that ambiguity just as he has now, by interpret-

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[13] The Ninth Circuit recently granted rehearing en banc to consider the proper level of deference to be extended to the Director's interpretation of the Act. See *Price* v. *Stevedoring Servs. of Am., Inc.*, 653 F.3d 928 (2011), granting reh'g of 627 F.3d 1145 (2010). En banc proceedings in *Price* have been stayed pending this Court's decision in this case.

ing the provision in light of both the role it plays in the larger statutory scheme and his day-to-day experience administering the statute. Indeed, the Board's decision in this case summarized *Reposky* as holding "that the pertinent maximum rate is determined by the date the disability commences, as this interpretation of the language of Section [906(c)] 'maintains consistency in the statute and yields rational results.'" Pet. App. 20 (quoting *Reposky*, 40 Ben. Rev. Bd. Serv. at 76).

Although the Board's decision itself is not entitled to deference, see *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), its adoption of the Director's interpretation of Section 906(c) obviated any need for him to issue a regulation on the question. The fact that the Director was successful in having his interpretation adopted in a formal adjudication (that the agency's ALJs would subsequently be required to follow in all subsequent cases) should not result in the foreclosure of deference to that interpretation.

In all events, the Director's interpretation of the Act is, at the least, entitled to *Skidmore* deference. *Rambo*, 521 U.S. at 136 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).[14] That interpretation is persuasive for the reasons described above, and it is based on "a body of experience and informed judgment." *Skidmore*, 323 U.S. at 140.

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[14] *Rambo* extended *Skidmore* deference to the Director's litigating position before this Court. See 521 U.S. at 136. That case did not present the question of the appropriate level of deference for positions taken by the Director in proceedings before the agency. Likewise, the Director has sought only *Skidmore* deference in *Pacific Operators Offshore, LLP* v. *Valladolid*, No. 10-507 (argued Oct. 11, 2011), because the Director in that case had not stated a position on the question presented in agency proceedings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 33 U.S.C. 902 provides, in pertinent part:

Definitions

When used in this chapter—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

* * * * *

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultura. payrolls.

* * * * *

2. 33 U.S.C. 906 provides:

Compensation

(a) Time for commencement

No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title: *Provided, however,* That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

(b) Maximum rate of compensation

(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending

June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) **Applicability of determinations**

Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

3. 33 U.S.C. 908 provides, in pertinent part:

Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per

centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and

modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subsection, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subsection shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

(d)(1) If an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower,

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares,

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 909(d) of this title (other than a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 909(d) of this title, but if the aggregate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) of this section if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

* * * * *

4. 33 U.S.C. 909 provides:

Compensation for death

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subsection exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but—

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly bene-

fits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

5. 33 U.S.C. 910 provides:

Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-

employment, shall reasonably represent the annual earning capacity of the injured employee.

(d)(1) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs—

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable at the time of the injury.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of—

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applica-

ble national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

(g) The weekly compensation after adjustment under subsection (f) of this section shall be fixed at the nearest dollar. No adjustment of less than $1 shall be made, but in no event shall compensation or death benefits be reduced.

(h)(1) Not later than ninety days after October 27, 1972, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 906(b) of this title and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following October 27, 1972, and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this chapter at the time of the injury which resulted in the death or disability, then his average weekly wage shall be deter-

mined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following October 27, 1972. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this title, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date.

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

6. 33 U.S.C. 913 provides, in pertinent part:

Filing of claims

(a) Time to file

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

* * * * *

7. 33 U.S.C. 914 provides:

Payment of compensation

(a) Manner of payment

Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) Period of installment payments

The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Notification of commencement or suspension of payment

Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) Right to compensation controverted

If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) Additional compensation for overdue installment payments payable without award

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Additional compensation for overdue installment payments payable under terms of award.

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

(g) Notice of payment; penalty

Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation

paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) Investigations, examinations, and hearings for controverted, stopped, or suspended payments

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Deposit by employer

Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) Receipt for payment

An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

8. 33 U.S.C 919 provides, in pertinent part:

Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Notice of claim

Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy

commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) Investigations; order for hearing; notice; rejection or award

The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subsection (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a[1] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by

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[1] So in original. Probably should be "an".

this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) Filing and mailing of order rejecting claim or making award

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) Awards after death of employee

An award of compensation for disability may be made after the death of an injured employee.

(g) Transfer of case

At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) Physical examination of injured employee

An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an

examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

9. 33 U.S.C. 933 provides, in pertinent part:

Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order

means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

* * * * *

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 14 2011
OFFICE OF THE CLERK

No. 10-1399

IN THE

Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Under Section 6(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 906(c), an employee's disability benefits are capped at twice the national average weekly wage for the year in which the employee is "newly awarded compensation" under the statute.

The question presented is: whether an employee is "newly awarded compensation" when he becomes entitled to compensation under the statute or only if and when he obtains an administrative order formally recognizing his right to compensation.

CORPORATE DISCLOSURE STATEMENT

Petitioner started his employment with respondent Sea-Land Services, Inc., a wholly owned subsidiary of CSX Corporation, in 1994. At the time of the events giving rise to this case in 2002, petitioner was employed by CSX Lines of Alaska, LLC, an (indirectly) wholly owned subsidiary of CSX Corporation and a corporate successor to Sea-Land. CSX Lines was subsequently incorporated and changed its name to Horizon Lines, Inc. While CSX Corporation has divested itself of any ownership interest in Horizon Lines, CSX Corporation contractually retains liability for petitioner's disability benefits. Both CSX Corporation and Horizon Lines are publicly traded. Neither company has a parent corporation, and no publicly held company owns 10% or more of either company's stock.

Although we do not represent respondent Lumbermens Mutual Group (formerly Kemper Insurance Company), we understand that it is a mutual insurance company owned by its policyholders, from its incorporation in 1912 and continuing to today, and that it has no parent company and no shareholders.

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INTRODUCTION

The Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. § 901 *et seq.*, caps an employee's disability benefits at twice the national average weekly wage for the year in which the employee is "newly awarded compensation" under the statute. § 906(c). The Director of the Office of Workers' Compensation Programs, who is charged with administering the Act, has determined that an employee is "newly awarded compensation" for purposes of this provision when he becomes disabled and thus entitled to compensation under the statute. As the Director has explained, this interpretation is consistent with the statutory text, maintains consistency in the statute's compensation scheme, and ensures that similarly situated employees receive the same benefits.

Petitioner Roberts asks this Court to reject the Director's interpretation based on the purported plain meaning of the words "newly awarded compensation," which he contends unambiguously refer to the time when an employee obtains an adjudicated order recognizing his right to compensation. Contrary to Roberts's contention, however, the term "award," standing alone, is necessarily ambiguous and cannot be properly understood without considering the context in which it appears and the broader statutory scheme. By instead focusing on the words in isolation, contrary to basic tenets of statutory construction, Roberts's interpretation wrenches Congress's words from their statutory context, does serious violence to the Act's structure, and produces unworkable, arbitrary, and inequitable results that Congress could not have intended. Roberts's interpretation is deeply flawed and should be rejected.

STATUTORY PROVISIONS

Section 6 of the Longshore Act, 33 U.S.C. § 906, is set out below. Other pertinent statutory and regulatory provisions are contained in an addendum to this brief.

§ 906. Compensation

(a) Time for commencement

No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title: *Provided, however*, That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

(b) Maximum rate of compensation

(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such

year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Applicability of determinations

Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

STATEMENT OF THE CASE

A. Statutory Background.

1. The Longshore Act establishes a uniform federal compensation scheme for longshoremen and harbor workers disabled or killed on navigable waters of the United States. § 903(a). Originally enacted in 1927, the Act was prompted by this Court's holding that state workers' compensation laws could not constitutionally extend to such employees. *Ne. Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256–58 (1977); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 119–22 (1962).

Like workers' compensation statutes generally, the Longshore Act "represents a compromise between the competing interests of disabled laborers and their employers." *Potomac Elec. Power Co.* v. *Dir., OWCP*,

449 U.S. 268, 282 (1980). Employees exchange potentially higher payouts and common-law remedies for "prompt and certain recovery." *Id.* at 281–82 & n.24. Employers, in turn, receive "definite and lower limits on potential liability," with "their contingent liabilities identified as precisely and as early as possible," while forfeiting common-law defenses to liability. *Id.* at 281–82; see also *Dir., OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 131 (1995); *Wash. Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 931 (1984).

2. Computing a disabled employee's compensation under the Longshore Act begins by determining his wages at the time of injury. Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." § 902(10). As a result, the Act directs that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." § 910.

"Once the 'average weekly wage' is determined, a claimant's [disability] benefits are calculated under § 8 of the Act." *Bath Iron Works Corp.* v. *Dir., OWCP*, 506 U.S. 153, 157 (1993). Section 8 classifies disabilities along two axes according to whether they are (a) total or partial, and (b) permanent or temporary, the combination of which yields four separate categories of entitlement to disability benefits. § 908(a)–(e); *Potomac Elec.*, 449 U.S. at 273–74 & n.8.

Section 8 prescribes the method for calculating benefits for each category of disability. Totally disabled workers receive two-thirds of their average weekly wage at the time of injury throughout the period of disability. § 908(a), (b). For permanent partial disabilities, if the injury is one identified in the statutory schedule, compensation is also set at

two-thirds of the employee's average weekly wage at the time of injury, but is limited to a specified number of weeks. § 908(c)(1)–(20); *Potomac Elec.*, 449 U.S. at 273–74 & n.8. Employees with unscheduled permanent partial disabilities or with temporary partial disabilities are entitled to two-thirds of the difference between their average weekly wage at the time of injury and their residual wage-earning capacity thereafter. § 908(c)(21), (e); *Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 126–27 (1997).

3. Once an employee's basic compensation rate is calculated under Section 8, the inquiry turns to Section 6, which prescribes the Act's maximum and minimum compensation rates. Until 1972, these were fixed dollar amounts that Congress adjusted periodically, with the maximum ranging from $25 to $70 per week and the minimum ranging from $8 to $18 per week. See *Dir., OWCP* v. *Rasmussen*, 440 U.S. 29, 31–32, 36 n.8 (1979); Act of Mar. 4, 1927, ch. 509, § 6(b), 44 Stat. 1424, 1426; Act of June 24, 1948, ch. 623, § 1(b), 62 Stat. 602, 602; Act of July 26, 1956, Pub. L. No. 84-803, § 1(b), 70 Stat. 654, 655.

In 1972, Congress amended the Act, in part to address the fact that the statute's fixed maximum and minimum compensation rates had "lost real value as inflation exacted its annual toll." *Rasmussen*, 440 U.S. at 32; see also *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 82–83 & n.7 (1980); *Caputo*, 432 U.S. at 261–65 & n.18. To remedy this problem, the Act now ties compensation limits to the national average weekly wage, setting the maximum rate at 200% of the "applicable national average weekly wage," § 906(b)(1), and the minimum rate at 50% of that wage, § 906(b)(2).

The national average weekly wage is determined annually by the Secretary of Labor and applies for

the fiscal year running from October 1 to September 30. § 906(b)(3). Section 6(c), in turn, specifies that a given fiscal year's national average weekly wage applies to (a) "employees or survivors currently receiving compensation for permanent total disability or death benefits," and (b) "those newly awarded compensation during such period." § 906(c); see also *Rasmussen*, 440 U.S. at 41–45. For employees and survivors covered by Section 6(c)'s "currently receiving" clause (*i.e.*, those receiving compensation for permanent total disability or death benefits), the applicable maximum rate increases annually, and their basic compensation rate is also adjusted upward each year. § 910(f). For all others, the maximum rate is fixed permanently at the level at which it is first properly applied, and that amount does not change from year to year with the Secretary's annual redeterminations (a feature that applies under either of the competing interpretations of Section 6(c) advanced by the parties here). See *Reposky* v. *Int'l Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), *available at* 2006 WL 3101750, at *12–13.

4. The Act requires employers to pay the benefits described above "periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." § 914(a). Unless it disputes liability, an employer must begin making payments within two weeks after learning of the injury, § 914(b), and notify the Department of Labor's district director that it has done so, § 914(c).[1] This is

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[1] Acting under the Director of the Office of Workers' Compensation Programs, district directors are responsible for day-to-day administration of the Act. The statute speaks of "deputy commissioners," but the agency has replaced that term

so regardless of whether the employee has filed a claim. §§ 913(a), 914(a). Accordingly, in many cases, "no administrative proceedings ever [take] place, and no award [is] ever ordered by the [district director]." *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529, 534 (1983); see also *id.* at 536–37; *Am. Stevedores* v. *Porello*, 330 U.S. 446, 455–56 (1947).

Although not necessary to trigger the employer's obligation to pay compensation, an employee may file a claim with the district director within one year of the injury or, if the employer is voluntarily paying compensation, within one year of the last payment. §§ 919(a), 913(a). If neither party requests a hearing on the claim, the district director may resolve the matter informally and enter an order either rejecting the claim or awarding compensation. § 919(c), (e); 20 C.F.R. § 702.311 *et seq.* "[I]n practice," however, "many pending claims are amicably settled through voluntary payments without the necessity of a formal order by the [district director]." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975).

If the parties cannot resolve the matter informally, the case is referred to an administrative law judge (ALJ) for a formal hearing. § 919(c), (d). After the hearing, the ALJ issues a "compensation order" either "rejecting the claim or making the award." § 919(e). Appeals from a compensation order may be taken to the Benefits Review Board, § 921(b)(3), and from there to the court of appeals for the circuit in which the injury occurred, § 921(c).

B. Proceedings Below.

1. Roberts was injured on February 24, 2002, when he slipped on a patch of ice while working as a

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with "district directors" for administrative purposes. 20 C.F.R. §§ 701.301(a)(7), 702.105.

gatehouse dispatcher in Dutch Harbor, Alaska. Pet. App. 34, 37. He sought medical treatment shortly thereafter but continued working until March 11, 2002. *Id.* at 37–38. His injuries ultimately led to surgeries on his right shoulder and neck. *Id.* at 79–80. The employer voluntarily paid Roberts temporary total disability benefits for various periods from the time he stopped working through May 17, 2005. *Id.* at 101. The parties then disputed liability and the matter was referred to an ALJ for a hearing in January 2006. *Id.* at 34.

2. The ALJ issued his decision and order in October 2006. Pet. App. 33. He found that Roberts had suffered disabling injuries to his neck and right shoulder in the course of covered employment and was thus entitled to benefits. *Id.* at 65–90. He then calculated the compensation that Roberts was due. He began by determining that Roberts's average weekly wage at the time of the injury was $2,853.08. *Id.* at 93–97. Next, he found that Roberts reached maximum medical improvement on July 12, 2005, *id.* at 58, 99, and that although he could not return to his former job, suitable alternative employment was available to him as of October 10, 2005, *id.* at 104–07. This meant that Roberts was temporarily totally disabled from March 11, 2002, through July 11, 2005; permanently totally disabled from July 12, 2005, through October 9, 2005; and permanently partially disabled thereafter. *Id.* at 102, 107–08.

These findings, in turn, dictated Roberts's basic compensation rates: $1,902.05 for periods of total disability (two-thirds of his average weekly wage of $2,853.08) and $1,422.05 for periods of permanent partial disability (two-thirds of the difference between his average weekly wage and his residual earning capacity of $720). See § 908(a)–(c).

The maximum weekly compensation rate at the time Roberts became disabled was $966.08, or twice the national average weekly wage for fiscal year 2002. Pet. App. 102–03. Because Roberts's basic compensation rates exceeded this amount, the ALJ held that he was entitled to $966.08 per week for his periods of temporary total and permanent partial disability. *Id.* at 107–08. For the few months in 2005 during which Roberts was permanently totally disabled, the ALJ ordered weekly payments of $966.08 "plus any increases required under section 6." *Id.* at 107; see *supra*, 6 (annual compensation adjustments required for permanent total disability). He also ordered "interest on each unpaid installment of compensation from the date the compensation became due," and credited all compensation that had been paid voluntarily. Pet. App. 108.

Roberts moved for reconsideration seeking an increase in the maximum compensation rate applied to his claim. Pet. App. 28–32. While the motion was pending, the Benefits Review Board decided *Reposky* v. *International Transportation Services*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), *available at* 2006 WL 3101750. Adopting the position advanced by the Director of the Office of Workers' Compensation Programs, the Board in *Reposky* held that an employee is "newly awarded compensation" under Section 6(c) when "the disability commences," which is generally at the time of injury. *Id.* at *12–13. The Board agreed with the Director that this interpretation is consistent with the statute's text, "maintains consistency in the statute and yields rational results." *Id.* at *13. Roberts acknowledged that *Reposky*

foreclosed his argument. Pet. App. 29–32. The ALJ agreed and denied the motion. *Id.*[2]

3. The Benefits Review Board affirmed the ALJ's orders in their entirety. Pet. App. 14–27. The Board declined Roberts's request to overrule *Reposky* and confirmed that the maximum rate applicable to his disability benefits is twice the national average weekly wage for fiscal year 2002, when Roberts became entitled to compensation, not fiscal year 2007, when the ALJ issued his order. *Id.* at 18–20.

4. The court of appeals affirmed in relevant part. Pet. App. 12–13. Agreeing with the Director and the Board, the court held that an employee is "'newly awarded compensation' within the meaning of section 6(c) when he first becomes entitled to compensation." *Id.* at 9–10. The court rejected Roberts's contention that the word "award" in the Longshore Act invariably refers to a compensation order. To the contrary, the court observed, Congress used the word "award" variously in the Act, sometimes to mean "a formal compensation order issued in the course of administrative adjudication," *id.* at 6, other times to "refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal order of compensation," *id.* at 6–8 (citing §§ 908(c)(20), (22), 910(h)(1)).

These latter provisions, the court explained, could not refer to a compensation order because they

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[2] In calculating benefits for the period from July 12, 2005, through October 9, 2005, the district director had mistakenly applied the fiscal year 2002 maximum for the entire period. From October 1 to 9, 2005, however, Roberts was permanently totally disabled and thus was entitled to the fiscal year 2006 maximum rate of $1,073.64 under Section 6(c)'s "currently receiving" clause. The ALJ corrected this error. Pet. App. 30–31.

address the compensation to which an employee is entitled under the Act, and "employers are obligated to pay such compensation regardless of whether an employee files an administrative claim." Pet. App. 6. Moreover, in Section 33(b) Congress expressly defined "award" to mean a compensation order for purposes of that subsection only. *Id.* at 8. This, the court reasoned, implies that "the meaning of the term 'award' in other sections is not limited to a formal compensation order," because otherwise "the specific definition in section 33 would be unnecessary." *Id.*

Because the word "award" has different meanings in different provisions of the Act, the court examined the statutory context to determine which meaning Congress intended in Section 6(c). The court observed that Section 6 "uses 'awarded' in the same context as sections 8 and 10," in that all three provisions "gover[n] determinations of compensation under the Act." Pet. App. 7. The court thus concluded that the word "awarded" in Section 6(c) should be interpreted "[c]onsistent with the meaning of 'awarded' in sections 8 and 10" to refer to an employee's entitlement to compensation under the Act. *Id.*

The court further concluded that Section 6(c) must be read "'with a view to its place in the overall statutory scheme.'" Pet. App. 8 (alteration omitted). Because the Act "identifies the time of injury as the appropriate marker for other calculations relating to compensation," the court concluded that interpreting Section 6(c) to turn on the time when an employee becomes disabled "accords with the structure of the [Act]," whereas Roberts's interpretation "depart[s] from the Act's pattern of basing calculations on the time of injury." *Id.* at 8–9.

The court also noted that Roberts's interpretation would produce "inequitable results" because two

otherwise identically situated employees "could be entitled to different amounts of compensation depending on when their awards are entered." Pet. App. 9 n.1. The court rejected Roberts's argument that this arbitrary result was necessary to "encourag[e] employers to expedite administrative proceedings," noting that the Act "already provides penalties for delay by an employer." *Id.*

Accordingly, the court of appeals held that Roberts was "newly awarded compensation" in fiscal year 2002, when he became disabled and thus entitled to compensation under the Act, and that his compensation was therefore capped based on the national average weekly wage for that year rather than the year in which his compensation order issued. Pet. App. 9–10.[3]

SUMMARY OF ARGUMENT

The decision below is correct and should be affirmed. As both the Director of the Office of Workers' Compensation Programs and the Benefits Review Board have concluded, an employee is "newly awarded compensation" for purposes of Section 6(c) when he becomes entitled to benefits under the Act. That interpretation is fully consistent with Section 6(c)'s text and, unlike Roberts's interpretation, accounts for Section 6(c)'s context and the structure of the Act's compensation scheme, provides a workable rule that applies to the full range of circumstances in which compensation is required and

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[3] The court of appeals also held that Roberts was "currently receiving compensation" during his period of permanent total disability in 2005, and that the applicable maximum rate for that period was therefore based on the national average weekly wage for fiscal year 2005. Pet. App. 10–13. That portion of the court's decision is not at issue here.

leaves no unexplained gap, and produces rational and equitable results. Roberts's attempt to read Section 6(c) in isolation violates basic principles of statutory interpretation and should be rejected.

I. A. Contrary to the central premise underlying Roberts's argument, the word "award" in Section 6(c), standing alone, does not have a plain or unambiguous meaning that decides this case. Although the word "award" often refers to a benefit that is formally assigned in an adjudication, it also often refers to a statutory entitlement, as when a speaker says that a statute "awards" compensation or some other benefit to a person. This latter meaning is particularly apt with respect to the Longshore Act, which requires employers to pay compensation to disabled employees regardless of whether the employee files a claim or obtains a compensation order.

Congress used the word "award" in both of these senses in various provisions of the Longshore Act. Sections 8 and 10 in particular repeatedly use the word "award" to refer to an employee's entitlement to compensation under the statute, even without a compensation order. Moreover, Congress specifically defined the word "award" to mean a compensation order only for purposes of Section 33(b), which provides for an assignment of rights when an employee accepts compensation under an "award" in a compensation order. If the word "award" already bore that meaning uniformly throughout the Act, as Roberts contends, this section-specific definition would be superfluous.

Once it is recognized that Congress did not use the word "award" uniformly in the Longshore Act, the term, standing alone, is necessarily ambiguous, and its meaning in a given provision can be determined only by examining the provision's context and its role

in the statutory scheme. By itself, Section 6(c)'s text does not answer the question presented.

B. The context of Section 6(c) makes clear that an employee is "newly awarded compensation" when he becomes entitled to benefits under the Act. Like Sections 8 and 10—which determine an employee's basic compensation rate before it is capped—Section 6 addresses the amount of compensation to which an employee is entitled under the Act. Nothing in the provision's context suggests that Congress intended the maximum compensation rate to turn on the date when a compensation order is entered.

The structure of the Longshore Act confirms this interpretation. The Act's compensation scheme is keyed to the employee's wages at the time of injury. Under Section 10, the employee's average weekly wage at the time of injury "shall be taken" as the basis for computing compensation. And under Section 8, the employee receives a specified percentage of his average weekly wage at the time of injury as his basic compensation rate. Interpreting Section 6(c) to turn on the time when an employee becomes disabled and thus entitled to compensation best harmonizes Section 6 with the Act's other basic compensation provisions. Nowhere, by contrast, did Congress provide that an employee's measure of compensation depends on the arbitrary date when a compensation order is entered.

Tying the maximum compensation rate to the date of a compensation order would also be unworkable. In most cases, employers voluntarily pay compensation without a compensation order. If Section 6(c) turned on the date when a compensation order issues, then the Act would be silent as to the applicable maximum compensation rate for these cases, leaving a gaping hole in the statute's coverage. Even in cases where a

compensation order is issued, an employer would not be able to determine the appropriate compensation rate at the time it must begin paying compensation, because it would not know the year in which the compensation order will issue or the national average weekly wage for that future year. Indeed, even where the employer immediately and voluntarily begins paying precisely the amount required by the Act, an employee would be able to raise his compensation rate merely by filing a meritless challenge to that amount—a challenge that would not be adjudicated and rejected in a formal compensation order until a future year, at which point a higher maximum rate would be in effect. Tying the maximum rate to the date of disability, by contrast, yields a rule that is immediately capable of application in every case and is not subject to manipulation.

Roberts's interpretation, moreover, would produce arbitrary and inequitable results: Two employees who earned the same wage and became disabled on the same day would be subject to different maximum compensation rates depending solely on the happenstance of whether or when they obtained a compensation order. This result cannot be justified as a means of discouraging employer delay, as the Longshore Act already contains adequate remedies for employers who improperly delay payment, and increasing the maximum compensation rate in the small and random fraction of cases in which the cap happens to apply would be an incoherent way to address the problem.

Reading Section 6(c) to turn on the date when an employee becomes disabled is further supported by analogous state workers' compensation laws, the overwhelming majority of which tie the maximum compensation rate to the state's average weekly wage

at the time of injury. Nothing in the Act's purpose or history suggests that Congress intended to depart from this standard approach.

II. To the extent any ambiguity remains after applying the usual tools of statutory interpretation, the Director of the Office of Workers' Compensation Programs, as the official charged with administering the Act, is entitled to resolve that ambiguity, and his reasonable interpretation is entitled to *Chevron* deference. The Director has power to issue binding interpretations of the Longshore Act and has exercised that power in a manner that warrants judicial deference. His interpretation is not a mere litigating position, but rather represents the official position he has taken before the Benefits Review Board in an exercise of his delegated lawmaking powers, as well as the longstanding position governing district directors' informal adjudication of claims. At a minimum, the Director brings a body of experience and informed judgment to the question, and the Court should defer to his interpretation based on its power to persuade.

ARGUMENT

I. AN EMPLOYEE IS "NEWLY AWARDED COMPENSATION" UNDER SECTION 6(c) WHEN HE BECOMES ENTITLED TO COMPENSATION UNDER THE ACT.

The sole issue in this case is when Roberts was "newly awarded compensation" for purposes of Section 6(c), and thus which fiscal year's national average weekly wage governs his maximum compensation rate. In accord with the position urged by the Director and adopted by the Benefits Review Board in *Reposky*, the ALJ, the Board, and the court of appeals all held that Roberts was "newly awarded

compensation" in fiscal year 2002, when he became disabled and thus entitled to compensation under the Act. Roberts argues that he was "newly awarded compensation" in fiscal year 2007, when his compensation order was entered. According to Roberts, this conclusion is compelled by the plain language of Section 6(c) because the word "award" unambiguously refers to a compensation order and because Congress used the term in that sense uniformly throughout the Longshore Act.

Roberts is wrong. Although the word "award" often refers to a benefit that is assigned by administrative or judicial decree, it can also refer to an entitlement created by statute, separate and apart from any other official recognition of that entitlement. Congress used the word "award" in both senses in various provisions of the Longshore Act. Thus, the word "award," read in isolation, is necessarily ambiguous. To determine which meaning Congress intended in any particular provision, it is necessary to examine the specific context in which the word appears and its place in the broader statutory scheme. That analysis leaves little doubt as to which meaning Congress intended in Section 6(c): An employee is "newly awarded compensation" when he becomes disabled and thus entitled to compensation under the statute. Roberts's contrary interpretation ignores Section 6(c)'s role in the Act's compensation scheme, produces incongruous results, and should be rejected.

A. Standing Alone, The Text Of Section 6(c) Is Ambiguous As To When An Employee Is "Newly Awarded Compensation."

1. Contrary to Roberts's central contention, the word "award" does not have a single plain meaning that dictates the proper interpretation of Section 6(c). Cf. *Boroski* v. *DynCorp Int'l*, No. 11-10033, 2011 WL

5555686, at *17 (11th Cir. Nov. 16, 2011) (relying on the purported "plain reading" of Section 6(c)); *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997) (same).

Of course, the verb "award," particularly when used "in the litigation context," often means "'to give or assign by sentence or judicial determination.'" *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2526 (2010) (quoting *Black's Law Dictionary* 125 (5th ed. 1979) (alterations and emphasis omitted)). But the word has a broader semantic range: It is frequently used more generally to mean "to grant" or "to confer." See, *e.g.*, *New Oxford American Dictionary* 112 (3d ed. 2010) ("grant or assign"); *American Heritage Dictionary of the English Language* 125 (4th ed. 2009) ("To grant as merited or due"); 1 *Shorter Oxford English Dictionary* 160 (5th ed. 2002) ("Grant, assign"); *Webster's New Collegiate Dictionary* 79 (1977) ("to confer or bestow as being deserved or merited or needed"); *Webster's Third New International Dictionary* 152 (1971) ("to confer or bestow upon : GRANT, GIVE").

In this latter sense, the word "award" can be and often is used in reference to a legal entitlement created by statute. Just as a statute may "grant" or "confer" a right, so too may a statute "award" a legal entitlement. An electronic search of federal and state cases yields hundreds of examples in which courts, including this Court, have used the word "award" in this sense. See, *e.g.*, *Astrue*, 130 S. Ct. at 2526 ("the statute awards [attorney's fees] to the prevailing party"); *Connecticut* v. *Doehr*, 501 U.S. 1, 28 (1991) (Rehnquist, C.J., concurring in part and in judgment) ("mechanic's lien statutes award an interest in real property to workers who have contributed their labor"); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 271 (1988) (considering an Ohio "provision that

awards a tax credit" for sales of ethanol); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 456 n.12 (1982) (Blackmun, J., dissenting) ("the statute awards just compensation"); *Orr* v. *Orr*, 440 U.S. 268, 273 n.3 (1979) ("the current statutes award alimony to wives based not solely upon need"); *Reconstr. Fin. Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 171 (1943) ("[t]he statute awards the claim priority of payment"); *Thornley* v. *United States*, 113 U.S. 310, 314 (1885) ("the statute book is now bare of any enactment which awards to any officer of the navy . . . any increase of pay for length of service").[4]

It is thus perfectly acceptable English usage to say that the Longshore Act "awarded" compensation to Roberts when he became entitled to benefits under the Act. Indeed, courts have long characterized workers' compensation statutes as "awarding" compensation to disabled workers.[5] Cf. *Kasten* v. *Saint-*

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[4] *See also, e.g., Canady* v. *Crestar Mortg. Corp.*, 109 F.3d 969, 975 (4th Cir. 1997) (the "statute awards interest on damages"); *Goodrich* v. *Sec'y of Dep't of Health & Human Servs.*, No. 90-637V, 1991 WL 112205, at *1 (Cl. Ct. June 7, 1991) ("The statute awards compensation for" vaccine-related injuries); *Cavender* v. *Donovan*, 752 F.2d 1376, 1377 (9th Cir. 1985) (per curiam) ("the statute awards [unemployment benefits] to those who lost their employment"); *Shelvy* v. *Whitfield*, 718 F.2d 441, 446 (D.C. Cir. 1983) (Bazelon, J., dissenting) ("[t]he relevant statute awards credit for time spent in custody"); *Shands* v. *Tull*, 602 F.2d 1156, 1160 (3d Cir. 1979) ("the statute awards bonuses to states"); *McKay* v. *Wahlenmaier*, 226 F.2d 35, 47 (D.C. Cir. 1955) ("the statute awards the lease to the first qualified applicant"); *Associated Music Publishers, Inc.* v. *Debs Mem'l Radio Fund, Inc.*, 141 F.2d 852, 855 (2d Cir. 1944) ("The statute awards copyright protection"); *Barrett* v. *Commercial Credit Co.*, 296 F. 996, 998 (D.C. Cir. 1924) ("the statute awards a lien for work done or materials furnished").

[5] *See, e.g., Pac. Emp'rs Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 500 (1939) (the workers' compensation "statute

Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1332 (2011) (examining "contemporaneous judicial usage," among other things, to ascertain plain meaning). This usage is particularly well suited to the Longshore Act, which requires employers to pay compensation promptly without the compulsion of a compensation order. § 914(a); *Am. Stevedores*, 330 U.S. at 456 ("The employee thus receives compensation payments quite soon after his injury *by force of the Act.*") (emphasis added).

Thus, when used in reference to a statutory right, such as a right to compensation under a workers' compensation statute, the verb "award" means to grant, confer, or entitle. The phrase "newly awarded compensation" in Section 6(c) can therefore naturally be read to mean newly entitled to compensation. Although the phrase, standing alone, could also mean newly issued a compensation order, nothing in the plain meaning of the words Congress used dictates that interpretation. Read in isolation, the words comfortably bear either meaning. Cf. *Kasten*, 131 S.

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award[s] compensation for injuries to an employee"); *Johnson* v. *Merch's. Fertilizer Co.*, 17 S.E.2d 695, 697 (S.C. 1941) ("The Workmen's Compensation Statute awards damages for injuries received in the line and scope of employment."); *Kuczynski* v. *Humphrey*, 192 A. 371, 373 (N.J. 1937) ("The statute awards compensation for personal injuries suffered by accident arising out of and in the course of the employment, if disability results."); *Wasson Coal Co.* v. *Indus. Comm'n*, 143 N.E. 584, 585 (Ill. 1924) ("[t]he statute awards compensation where there is actual dependency at the time of the injury"); *Shaw's Case*, 141 N.E. 858, 859 (Mass. 1923) ("The statute awards compensation for loss of earning capacity caused by the injury as compared with the employee's average weekly wage."); *Taylor* v. *Swift & Co.*, 219 P. 516, 519 (Kan. 1923) ("Th[e] statute awards compensation for accidents and consequent injuries arising in the course of the workman's employment and because of it.").

Ct. at 1332 ("the three-word phrase, taken by itself, cannot answer the interpretive question").

2. Roberts is also mistaken that Congress consistently used the word "award" in the Longshore Act to refer to a compensation order. Congress used the word in that sense in some of the Act's provisions, to be sure. See, *e.g.*, §§ 913(a), 914(a), 919(c), 921(d), 933(b). As the court of appeals correctly recognized, however, in other provisions Congress used "award" to refer to an employee's entitlement to benefits under the Act, even without a compensation order. Pet. App. 6–7; cf. *Wash. Metro. Area Transit Auth.*, 467 U.S. at 934 (concluding that the word "employer" in Longshore Act Section 5(a) includes general contractors based on Congress's "use of the term 'employer' elsewhere in the Act").

Section 8, for example, repeatedly uses the word "award" to refer to entitlement to compensation. Section 8(c)(20) provides that "[p]roper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck." § 908(c)(20). Similarly, Section 8(c)(22) provides that "the award of compensation" for loss of multiple body parts shall be for each body part and that the "awards" shall run consecutively. § 908(c)(22). In both provisions, Congress used the word "award" to refer to the compensation to which an employee is entitled under the statute, regardless of whether the employee obtains a compensation order. That is clear from the structure of Section 8, which begins by directing that "[c]ompensation for disability shall be paid to the employee as follows," and then specifies the amount of compensation that "shall be paid" for different classes of disability. § 908(a)–(c). In context, it is clear that Congress used the word "award" in

Sections 8(c)(20) and (22) to refer to the amount of compensation an employee is entitled to be paid.

Moreover, a contrary interpretation would produce an inexplicable exception to the Act's mandate that compensation must be paid without a compensation order. § 914(a). Roberts seemingly embraces this anomalous result, contending that the "award" language in Sections 8(c)(20) and (22) "merely contemplate[s] that *awards will be entered*." Petr. Br. 30. Under that interpretation, however, an employer would have no obligation to pay compensation for serious disfigurement or loss of multiple body parts unless and until the employee obtained a compensation order. Roberts offers no reason to believe that Congress singled out these two forms of disability for disfavored treatment, and there is none. The court of appeals correctly concluded that "[b]y use of the term 'awarded,' Congress could not have meant 'assigned by formal order in the course of adjudication,' given that employers are obligated to pay such compensation regardless of whether an employee files an administrative claim." Pet. App. 6.

Section 8(d) likewise uses "award" to mean entitlement to compensation. It provides that "[i]f an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)–(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors." § 908(d)(1); see also § 908(d)(2). An employee may of course be "receiving compensation" without a compensation order. § 914(a). If "award" invariably meant a compensation order, as Roberts maintains, then the survivors of such an employee would not be entitled to the unpaid compensation due to the employee under the Act, because there would

be no "award," and hence no unpaid amount of the award, at the time of the employee's death. That contention has been soundly rejected. See, *e.g.*, *Wood* v. *Ingalls Shipbuilding, Inc.*, 28 Ben. Rev. Bd. Serv. (MB) 27 (1994), *available at* 1994 WL 186076, at *7 (per curiam) (holding that a survivor is entitled to benefits under Section 8(d) even if no compensation order has been entered at the time of the employee's death). Again, there is no reason to believe Congress disfavored survivors of employees whose employers voluntarily pay the compensation they owe without a compensation order, as the Act expressly requires them to do. See S. Rep. No. 92-1125, at 6 (1972) (explaining that Section 8(d) "provide[s] for payment of survivor benefits in situations where a worker who is *entitled to* benefits" dies) (emphasis added).

Similarly, Section 10 uses the phrase "awarded compensation" to mean "entitled to compensation." See Pet. App. 7. Section 10(h)(1) provides for upward adjustments to the "compensation to which an employee or his survivor *is entitled* due to total permanent disability or death which commenced or occurred prior to October 27, 1972." § 910(h)(1) (emphasis added). Among these adjustments is an increase in the average weekly wage of such an employee who was "awarded compensation" at less than the maximum rate at the time of his injury. *Id.* Under Roberts's logic, this adjustment would apply only to employees who had obtained compensation orders and not to other employees who were entitled to compensation "due to total permanent disability or death which commenced or occurred prior to October 27, 1972." Again, Roberts does not explain why Congress would have adopted an arbitrary distinction

between employees who obtain compensation orders and those who do not.[6]

These provisions show that Congress used the word "award" variously in the Longshore Act, sometimes to refer to a compensation order, other times to refer to an employee's entitlement to benefits under the statute. Thus, the examples Roberts cites in which "award" refers to a compensation order, Petr. Br. 22–23, "at most demonstrate that the term ['award'] may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343 (1997). Because Congress used the word "award" in different senses in different provisions, "the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Id.* at 343–44; see also *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506 (2010) (the presumption that a term means the same thing throughout a statute "yields readily to indications that the same phrase used in different parts of the same statute means different things"); *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574–76 (2007); *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595–96 (2004);

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[6] Other provisions of the Longshore Act appear to use "award" to mean entitlement to compensation as well. Section 32(a)(2), for example, requires self-insuring employers to post a security deposit and allows the Director to draw upon the deposit as necessary "to pay compensation awards." § 932(a)(2). This provision has been interpreted to permit the Director to draw upon the security deposit in the absence of a compensation order when an employer becomes bankrupt and previously was making voluntary payments. *See* 70 Fed. Reg. 43,224, 43,226 (July 26, 2005).

United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001).

3. If further confirmation were needed that Congress did not use the word "award" uniformly throughout the Act to refer to a compensation order, it is provided by Section 33(b). Section 33(b) provides that acceptance of compensation "under an award in a compensation order" operates as an assignment to the employer of the employee's cause of action against third parties. § 933(b). In the final sentence of the provision, Congress included a specific definition of "award" that applies only to Section 33(b): "For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the [district director], an administrative law judge, or Board." *Id.*

As the court of appeals observed, "Section 33 implicitly contemplates that the meaning of the term 'award' in other sections is not limited to a formal compensation order," because otherwise "the specific definition in section 33 would be unnecessary." Pet. App. 8; cf. *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 783–84 (2000) (the fact that Congress expressly defined "person" to include states for purposes of one provision indicated that states were not persons under other provisions). Roberts's argument renders the final sentence of Section 33(b) superfluous, contrary to basic principles of statutory construction. See, *e.g.*, *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010); *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

Roberts concedes that his interpretation of "award" renders Section 33(b)'s specific definition superfluous. Petr. Br. 29 ("The added specificity, '[f]or the purpose

of this subsection,' was indeed 'unnecessary.'"). He attempts to explain away this anomaly by pointing out that shortly before Congress amended Section 33(b) to add the specific definition, this Court held in *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529 (1983), that acceptance of voluntary compensation payments does not trigger an assignment under Section 33(b). Petr. Br. 24–29. But *Pallas Shipping* turned on the meaning of "compensation order," not "award," and the Act consistently uses "compensation order," unlike "award," to mean a formal grant of compensation "following proceedings with respect to a claim." 461 U.S. at 534; see § 919(e) (defining "compensation order" as an "order rejecting the claim or making the award").[7]

Nor does the fact that Congress later ratified *Pallas Shipping*'s holding by adding the specific definition of "award" to Section 33(b) justify reading that language as surplusage. If Congress had intended "award" to mean the same thing throughout the Act, it would have included the definition in Section 2 along with the Act's other generally applicable definitions rather than adding a specific definition to Section 33(b) that by its terms applies only "[f]or the purpose of this subsection." If "award" were interpreted to mean a compensation order throughout the Act, then Congress's "careful limitation" of the definition to Section 33(b) "would be nullified." *Bennett*, 520 U.S. at 173; see also *S.D. Warren Co.* v. *Me. Bd. of Envtl.*

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[7] *Amicus* American Association for Justice (AAJ) contends that Section 19(e) defines the term "award." AAJ Br. 8. It does not. Section 19(e) defines "compensation order," not "award." And although the context makes clear that Section 19(e) uses "award" to mean a formal grant of compensation following administrative proceedings, the provision does not suggest that the word has that same meaning throughout the Act.

Prot., 547 U.S. 370, 384 (2006); *Bates* v. *United States*, 522 U.S. 23, 29–30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration and internal quotation marks omitted).

4. Given that Congress used "award" to mean entitlement to compensation in multiple provisions of the Longshore Act, as well as the clear negative inference arising from Section 33(b)'s specific definition of "award," there is no merit to Roberts's contention that Congress would have written "newly entitled to compensation" if it had intended to make the time of entitlement determinative under Section 6(c). Petr. Br. 40–41. Congress could just as easily have written "newly issued a compensation order" if it had intended to make the date of the compensation order determinative. Instead Congress used a term that, standing alone, is "necessarily ambiguous." *Robinson*, 519 U.S. at 343. Thus, the fact that Congress elsewhere in the Act referred expressly to entitlement to compensation is no more probative than the fact that Congress elsewhere in the Act referred expressly to compensation orders.

Nor does it help Roberts that the "same Congresses that passed and reenacted § 6(c) in 1972 and 1984" used the word "entitlement" elsewhere in the 1972 and 1984 Amendments. Petr. Br. 40. Several of the provisions that use "award" to mean entitlement were also enacted alongside Section 6(c) in the 1972 Amendments. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, sec. 5(c), § 8(d), 86 Stat. 1251,

1253; *id.* sec. 7, § 8(c)(20), 86 Stat. at 1255; *id.* sec. 11, § 10(h)(1), 86 Stat. at 1258.

Moreover, the Longshore Act uses a variety of different formulations to express the idea of entitlement to compensation. In addition to express references to entitlement and the uses of "award" described above, the Act refers to an employee's "right to compensation," §§ 902(11), 908(j)(2)(B), 913(a), 914(d), 914(h), 915(b), 933(i), as well as to compensation that "shall be payable," §§ 903(a), 903(d)(2), 904(b), 908(d)(1), 909; "shall be allowed," § 906(a); "shall be paid," §§ 908(a)–(c), (d)(1)(B), (D), (f)(2)(A); and that an employee "shall receive," §§ 906(b)(2), 908(g), 910(h)(1). It thus cannot be inferred that Congress always used the word "entitled" whenever it meant to convey the concept of entitlement, or that it necessarily would have done so in Section 6(c) if it intended to make the date of entitlement determinative.

For the same reasons, Roberts errs in relying on *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992). The Court there did not interpret Section 6(c), and it did not construe the word "award." Rather, it held only that an employee may be "entitled to compensation" for purposes of Section 33(g)'s forfeiture provision even if the employer is neither paying compensation voluntarily nor subject to a compensation order. *Id.* at 475–84. Contrary to Roberts's asserted "parity of reasoning," Petr. Br. 33–34, that proposition does not entail the converse proposition that an employee may not be "awarded" compensation for purposes of Section 6(c) by virtue of his entitlement to compensation under the statute. Moreover, *Cowart* was based in part on the Court's conclusion that Congress used the phrase "person entitled to compensation" uniformly throughout the

Longshore Act, see 505 U.S. at 478–79—a premise that does not hold true of Congress's use of "award." Neither *Cowart*'s holding nor its logic "control[s]" the proper interpretation of Section 6(c).[8] Petr. Br. 34.

The upshot is that nothing on the face of the words "newly awarded compensation" answers the question presented in this case. Standing alone, that phrase could mean newly issued a compensation order, and it could also mean newly entitled to compensation. To determine which meaning Congress intended, it is therefore necessary to examine the context in which those words appear, as well as the structure of the Act as a whole. Cf. *Kasten*, 131 S. Ct. at 1333 ("The bottom line is that the text, taken alone, cannot provide a conclusive answer to our interpretive question. . . . We must look further.").

B. The Context Of Section 6(c) And The Structure Of The Act Make Clear That Benefits Are Capped Based On The Year In Which An Employee Becomes Entitled To Compensation.

A basic principle of statutory construction is that the meaning of a statutory term cannot be determined in a vacuum, but rather "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson*, 519 U.S. at 341). As

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[8] In fact, this Court's only prior decision addressing Section 6(c) assumed that a person is "newly awarded compensation" when he becomes entitled to compensation under the statute. *See Rasmussen*, 440 U.S. at 44 n.16 (providing a hypothetical example assuming that survivors are "newly awarded" death benefits when they become "entitled to" benefits, with no mention of a compensation order).

this Court has repeatedly stressed, "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and alteration omitted). Consequently, "[s]tatutory construction is a 'holistic endeavor,'" and a "'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

That is the case here. Once the analysis turns from a narrow focus on the phrase "newly awarded compensation" in isolation to the context in which that phrase appears and the structure of the Act as a whole, Congress's intent becomes clear: An employee is "newly awarded compensation" for purposes of Section 6(c) when he becomes disabled and thus entitled to compensation under the Act. That interpretation best accords with Section 6's role in the statutory scheme as a provision governing entitlement to compensation; harmonizes Section 6(c) with the Act's other compensation provisions; provides a rule of decision that is immediately capable of application in every case; and ensures that similarly situated employees receive the same benefits regardless of whether or when they obtain a compensation order. Roberts's interpretation, by contrast, is inconsistent with Section 6(c)'s context and the overall statutory scheme, and produces a variety of impractical, arbitrary, and inequitable results that Congress could not have intended.

1. It is a "cardinal rule" of statutory interpretation that "the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning . . . of certain words or phrases may only become evident when placed in context."); *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991) ("statutory language must always be read in its proper context"). Context is particularly important in determining the meaning of a word where, as here, Congress used the same word in more than one sense in the same statute. See, *e.g.*, *Barber*, 130 S. Ct. at 2506–07; *Duke Energy*, 549 U.S. at 575–76; *Gen. Dynamics*, 540 U.S. at 596; *Robinson*, 519 U.S. at 343–44; *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433–34 (1932).

Thus, in the Longshore Act provisions where "award" refers to a compensation order, it is not any intrinsically plain meaning of the word itself that makes the intended meaning clear, but the context in which the word appears. Cf. *Astrue*, 130 S. Ct. at 2526 ("The transitive verb 'award' has a settled meaning *in the litigation context*.") (emphasis added). Many of those provisions clearly contemplate an order entered after administrative or judicial proceedings. *E.g.*, § 919(c) (district directors may "by order" "reject the claim or make an award"); § 921(c) ("payment of the amounts required by an award shall not be stayed" pending judicial review); § 921(d) (consequences of failure "to comply with a compensation order making an award"); § 928(a) (attorney's fees "shall be awarded, in addition to the award of compensation, in a compensation order"). Other provisions, such as those requiring employers to provide benefits "without an award," clearly refer

to a compensation order, because reading "award" to mean entitlement would produce the absurd result that employers would be required to pay employees compensation to which they are not entitled. *E.g.*, §§ 913(a), 914(a), 928(b).

Section 6(c), by contrast, does not address the litigation context, and reading "awarded" to mean entitled produces no absurd results. Instead, "Section 6 uses 'awarded' in the same context as sections 8 and 10," in that all three sections "gover[n] determinations of compensation under the Act." Pet. App. 7. Entitled "Compensation," Section 6 governs the time at which an employee becomes entitled to compensation, § 906(a), as well as the maximum and minimum compensation to which an employee is entitled, § 906(b). The entire provision concerns the amount of compensation to which an employee is entitled under the statute. Reading "awarded" to mean entitled thus best accords with "'the specific context in which that language is used.'" *Nken*, 129 S. Ct. at 1756 (quoting *Robinson*, 519 U.S. at 341).

2. That reading also best fits with "'the broader context of the statute as a whole.'" *Id.* As the court of appeals explained, "holding that an employee is 'newly awarded' compensation when he first becomes disabled accords with the structure of the [Act], which identifies the time of injury as the appropriate marker for other calculations relating to compensation." Pet. App. 8. For example, the Act defines "wages" as the money rate at which an employee is compensated "at the time of the injury." § 902(13). Likewise, under Section 10, an employee's "average weekly wage" is calculated based on the employee's wages "at the time of the injury." § 910. An employee's average weekly wage, in turn, is the benchmark used to determine the compensation to

which he is entitled under Section 8. § 908(a)–(c), (e), (f)(1); see also *Bath Iron Works*, 506 U.S. at 164 n.13.

The Act's basic compensation scheme is thus focused on the employee's wages at the time of injury. There is no apparent reason why Congress would have based the "average weekly wage," used to calculate an employee's basic compensation rate, on the employee's wages at the time of injury, while at the same time capping the employee's compensation rate based on the "national average weekly wage" for the year in which a compensation order is entered. Cf. *Morrison-Knudsen Constr. Co.* v. *Dir., OWCP*, 461 U.S. 624, 633 (1983) ("we would expect the term 'wages' to maintain the same meaning throughout the [Longshore] Act"). The court of appeals correctly concluded that Section 6 should be read consistently with Sections 8 and 10, since those provisions govern an employee's compensation rate before it is capped by Section 6. See Pet. App. 8–9 ("To apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled would be to depart from the Act's pattern of basing calculations at the time of injury.").

Roberts makes three points in response, none of which supports his contention that an employee's maximum compensation rate should turn on the date a compensation order issues. *First*, Roberts argues that "the Act creates no unvarying 'pattern' of basing everything on the time of injury," citing various provisions that "specify varying events as those whose timing is critical." Petr. Br. 35–37. But the force of the structural argument does not require that "everything" in the Longshore Act turn on the time of injury. Rather, the point, which Roberts does not and cannot seriously dispute, is that the Act's basic

compensation scheme keys on the employee's wages at the time of his injury.

Second, Roberts notes that the interpretation adopted by the Director and the court of appeals ties the maximum compensation rate, not necessarily to the time of injury, but to the time when an employee becomes entitled to compensation, *i.e.*, the onset of disability. Petr. Br. 39. But the time of injury and the time of disability will generally coincide. For the scheduled injuries enumerated in Section 8(c)(1)–(20), the injury creates a "conclusive presumption" of disability. *Metro. Stevedore Co.* v. *Rambo*, 515 U.S. 291, 296 (1995); see also *Bath Iron Works*, 506 U.S. at 156 n.4. For other traumatic injuries, the distinction between injury and disability potentially makes a difference only in the relatively rare case in which an employee's loss in wage-earning capacity does not arise until some fiscal year after the year of injury. See § 902(10) (defining "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"); *Rambo*, 515 U.S. at 296–97.[9] And in cases of latent occupational disease (such as asbestosis), the injury by statutory definition does not occur until the employee becomes disabled. § 910(i) (defining the "time of injury" for disability due to an occupational disease that does not immediately result in disability as the date when the employee becomes aware of the

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[9] When an employee does not suffer a loss in wage-earning capacity shortly after the accident causing the injury, the Ninth Circuit has held that the "injury" occurs when the employee's disability becomes manifest. *See Johnson* v. *Dir., OWCP*, 911 F.2d 247, 249–50 (9th Cir. 1990); *but see LeBlanc* v. *Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161–62 (5th Cir. 1997) (holding that the time of injury is the time of the accident causing the injury).

relationship between the employment, the disease, and the disability).[10]

Moreover, the onset of disability, like the date of injury, is also a key marker governing an employee's entitlement to compensation under the Act. See, *e.g.*, § 903(a) (providing that the Act's coverage is based on disability); § 906(a) (providing that compensation is payable from the date of disability); § 910(h)(1) (providing upward adjustments to the compensation of employees whose disability commenced before October 27, 1972); § 919(a) (providing that an employee may file a claim "at any time after the first seven days of disability following any injury"). Nowhere, by contrast, does the Act make an employee's right to compensation depend upon the date when a compensation order is entered—an arbitrary date that has no logical connection to the Act's compensation scheme.

Third, Roberts argues that even if his reading produced the "sole departure" from an otherwise "all-inclusive pattern of determining benefits by reference to circumstances at the time of the onset of first disability," that would be an "insufficient" reason to reject his interpretation. Petr. Br. 38. Nothing better emblematizes Roberts's misguided effort to interpret Section 6(c) in a vacuum, without reference to "the language and design of the statute as a whole." *K-*

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[10] One reason Congress may have chosen not to phrase Section 6(c) in terms of injury or disability is that Section 6(c) applies to survivors as well as employees. Survivors need not be injured or disabled to be entitled to compensation, and a survivor's entitlement to compensation does not arise on the date when the employee was injured or disabled, but rather on the date when the employee died. *See* §§ 908(d), 909; *Ingalls Shipbuilding, Inc.* v. *Dir., OWCP*, 519 U.S. 248, 257–58 (1997); *Rasmussen*, 440 U.S. at 44 n.16.

mart Corp. v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). This Court has consistently examined the structure of the Longshore Act as a whole to determine the meaning of particular provisions. *E.g.*, *Cowart*, 505 U.S. at 477–79; *Wash. Metro. Area Transit Auth.*, 467 U.S. at 934–36; *Morrison-Knudsen*, 461 U.S. at 633–34. Likewise here, the Act's structure provides strong evidence that Congress intended compensation to be capped based on the year in which an employee becomes disabled and thus entitled to compensation, not the year in which a compensation order issues.

3. Another reason to reject Roberts's interpretation is that it would leave a major gap in the statute's coverage for cases in which employers voluntarily pay compensation without a compensation order. The Act expressly requires employers to pay compensation without a compensation order unless they file a notice controverting liability. § 914(a), (d). As a result, in most cases no compensation order is ever issued. Under Roberts's interpretation, however, the statute would be silent as to the applicable maximum and minimum compensation rates for these cases, because without a compensation order an employee would never be "newly awarded compensation" under Section 6(c). Absent some indication that Congress intended to exempt these cases from the Act's maximum and minimum compensation rates, the Court should not interpret Section 6(c) to create such an anomalous result. *Cf. Wash. Metro. Area Transit Auth.*, 467 U.S. at 935–36 (rejecting interpretation of Longshore Act that would leave "no apparent mechanism for enforcing" contractors' obligation to provide compensation); *Muscarello* v. *United States*, 524 U.S. 125, 136–37 (1998) (rejecting interpretation that would "remove [certain conduct] entirely from

the statute's reach, leaving a gap in coverage that we do not believe Congress intended").

Even when a compensation order is entered, Roberts's interpretation is impractical. If Section 6(c) turned on the date of the compensation order, employers who seek to comply with their obligation to pay compensation voluntarily would have no way to determine the appropriate compensation rate at the time they must begin making payments. An employer must generally begin paying compensation within 14 days after learning of the injury. § 914(b). At that point, the employer does not know if or when a compensation order will be entered, and thus does not know which fiscal year's national average weekly wage to apply. Even if the employer could predict the fiscal year in which a compensation order will issue, it still would not know what rate to apply, because the Secretary would not yet have determined the national average weekly wage for that future year. See § 906(b)(3). Congress could not have intended to create a regime at once so unworkable and so at odds with the Act's objective to allow employers to "hav[e] their contingent liabilities identified as precisely and as early as possible." *Potomac Elec.*, 449 U.S. at 282.

Roberts has no answer to this decisive point except to suggest that Section 19(c) requires a compensation order to be issued promptly in every case. See Petr. Br. 43. That is wrong. Section 19(c) comes into play only when an employee files a claim for compensation under Section 19(a). See § 919(a). And no such claim is necessary to trigger an employer's obligation to pay compensation; to the contrary, the Act expressly contemplates that employers who do not contest liability will pay compensation without requiring the employee to file a claim. See § 914(b) (providing that the first payment must be paid 14 days after the

employer learns of the injury, regardless of whether the employee has filed a claim); § 913(a) (providing that an employee must file a claim within one year after the injury or, if the employer voluntarily pays compensation without a compensation order, within one year after the date of the last payment); see also *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 92d Cong. 759 (1972) (letter from John M. Ekeberg, Director, Bureau of Employees' Compensation, U.S. Dep't of Labor) (Ekeberg Letter) ("Since in the vast majority of cases, compensation is voluntarily paid by employers, a formal claim for compensation generally need not be filed by an injured employee.").

Moreover, even when an employee does file a claim, "in practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order." *Intercounty Constr. Corp.*, 422 U.S. at 4 n.4; see also 20 C.F.R. § 702.315 (providing for informal resolution of claims by district directors without a formal compensation order); Ekeberg Letter, *supra*, at 757–58 (out of 84,000 cases closed in fiscal year 1971, only 209 were resolved by a compensation order after a formal hearing); Petr. Br. 43 (acknowledging that "district directors rarely issue compensation orders on uncontested claims in which the employer is making payments").

Roberts's proposed solution would undermine the Act's encouragement of voluntary payment and speedy dispute resolution. Under his approach, an employer who wished to determine the maximum compensation rate would have to contest liability and insist upon issuance of a compensation order, even though the employer does not in fact dispute liability

or have good-faith grounds to do so, and even though the case might otherwise be resolved without litigation. This would impose a substantial burden on employers, employees, and the agency, as most disability cases are resolved without administrative proceedings or a compensation order. See *Morrison-Knudsen*, 461 U.S. at 637 (observing that "more than 95% of all lost-time injuries are immediately compensated without recourse to the administrative process"); 20 C.F.R. § 702.301 (noting that "the vast majority" of cases can be resolved through informal procedures). It would also be contrary to Congress's intent in requiring employers to pay compensation voluntarily without a compensation order. And an employee would then likewise have an incentive to contest the amount the employer is voluntarily paying even when the employee has no actual disagreement with the employer's calculation, because the more protracted the litigation and the greater the delay before the ALJ issues a compensation order, the higher the maximum rate. "Without clear indication from Congress that this approach with its attendant problems is required," the Court should "decline to adopt it." *Morrison-Knudsen*, 461 U.S. at 634.

4. Roberts's interpretation would also produce arbitrary and inequitable results. If Section 6(c) turned on the date when a compensation order issues, then two otherwise identically situated employees could be subject to different maximum compensation rates depending on the happenstance of how long it took to adjudicate their claims. See Pet. App. 9 n.1. For example, an employee who sustained the same injury on the same day as Roberts, suffered from the same disability for the same period of time as Roberts, and earned the same average weekly wage as Roberts, but who obtained a compensation order in

fiscal year 2002 rather than fiscal year 2007, would be entitled to $966.08 per week, whereas Roberts would be entitled to $1,114.44 per week—a difference of about $600 per month. Nothing in the Act suggests Congress intended such incongruous results. See *Potomac Elec.*, 449 U.S. at 283 ("it is not to be lightly assumed that Congress intended that the [Act] produce incongruous results").

Roberts argues that this disparate treatment is justified by the need to discourage employers from contesting liability and thereby delaying payment. Petr. Br. 41–44. But Congress already provided a penalty for employers who unjustifiably delay payment. See § 914(e) (imposing a 10% penalty if "compensation payable without an award is not paid within fourteen days after it becomes due"); § 914(f) (imposing a 20% penalty if "compensation, payable under the terms of an award, is not paid within ten days after it becomes due").

Contrary to Roberts's contention, Petr. Br. 41–42, the fact that Section 14(e)'s penalty does not apply when the employer controverts liability does not suggest that Section 6(c) should be read to impose additional liability on employers who controvert liability. It suggests the opposite: That Congress limited penalties to cases where liability is either uncontested or adjudicated suggests that Congress concluded employers should have the right to contest liability without the specter of a penalty. Further, Congress expressly provided that employers are liable for mandatory attorney's fees if they decline to pay compensation and unsuccessfully contest liability. § 928(a). This provides adequate incentive against unjustified litigation, and further shows that if Congress had intended to impose additional liability

on employers who unsuccessfully contest liability, it would have done so expressly.

Moreover, if Congress had intended to penalize employers for contesting liability, it surely would have done so in a more rational and coherent manner. Most employees are not subject to the maximum or minimum compensation rate, and thus their compensation is not affected by Section 6. Adopting Roberts's interpretation would do nothing to compensate these employees for delayed payment. And under Roberts's interpretation an employer would be subject to the Section 6 "penalty" even if it had voluntarily paid compensation while contesting liability and the final compensation order *upheld* the employer's initial determination of the proper amount in the face of the employee's challenge. In such cases, the increased compensation would simply be a windfall to the employee. As a remedy for delayed payment, Roberts's version of Section 6(c) is thus badly under- and over-inclusive.

Nor is Roberts's interpretation necessary to make employees whole. Employees subjected to delayed payment are entitled to interest that "accrues from the date a benefit became due, rather than from the date of the ALJ's award." *Matulic* v. *Dir., OWCP*, 154 F.3d 1052, 1059 (9th Cir. 1998). This "ensures that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled." *Sproull* v. *Dir., OWCP*, 86 F.3d 895, 900 (9th Cir. 1996). In this very case, Roberts was awarded "interest on each unpaid installment of compensation from the date the compensation became due." Pet. App. 108.

5. Further support for the Director's interpretation can be found in state workers' compensation laws. The Longshore Act was enacted to fill the void

created by this Court's holding that states lacked jurisdiction to enact workers' compensation laws for longshoremen. See *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 217–18 (1917). The Act was designed to afford longshoremen "'the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union.'" *Calbeck*, 370 U.S. at 122 n.10. State laws thus provide an informative backdrop to this Court's interpretation of the Longshore Act.

Like the Longshore Act, most state workers' compensation laws cap benefits based on a percentage of the state's average weekly wage. See 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.04 (2011). The vast majority of these laws apply the average weekly wage for the year in which the injury occurred.[11] Only one state,

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[11] *See* Ala. Code § 25-5-68(a),(e); Alaska Stat. § 23.30.175(a); Ariz. Rev. Stat. § 23-1041(D), (E); Ark. Code Ann. § 11-9-501(b); Cal. Lab. Code § 4453; *Cook* v. *Recovery Corp.*, 911 S.W.2d 581, 581 (Ark. 1995); Colo. Rev. Stat. §§ 8-42-102(5)(a), 8-42-105, 8-42-106, 8-42-111; *Simpson* v. *Indus. Claim Appeals Office*, 219 P.3d 354, 363–64 (Colo. App. 2009), *rev'd in part on other grounds*, 232 P.3d 777 (Colo. 2010); Conn. Gen. Stat. § 31-309(a); Del. Code Ann. tit. 19, §§ 2324, 2325, 2326(h); *E.I. du Pont de Nemours & Co.* v. *Green*, 411 A.2d 953, 957 (Del. 1980); Fla. Stat. § 440.12(2)(a); Haw. Rev. Stat. §§ 386-31(a), 386-32(a); *Survivors of Young* v. *Island Feeling, Inc.*, 125 P.3d 476, 478–79 (Haw. 2006); 820 Ill. Comp. Stat. 305/8(b)(4); *Tal Rauhoff Constr. Co.* v. *Indus. Comm'n*, 501 N.E.2d 295, 296 (Ill. App. Ct. 1986); Iowa Code §§ 85.33(4), 85.34(2), (3)(a), 85.37; Ky. Rev. Stat. Ann. §§ 342.143, 342.730, 342.740; La. Rev. Stat. Ann. § 23:1202; Md. Code Ann., Lab. & Empl. § 9-602(a)(1); *Sanchez* v. *Potomac Abatement, Inc.*, 8 A.3d 737, 738 (Md. 2010); Mass. Gen. Laws ch. 152, § 1(10); Mich. Comp. Laws §§ 418.355, 418.371; Mo. Rev. Stat. §§ 287.170.1, 287.180.1, 287.190.5; Mont. Code Ann. §§ 39-71-701(3), 39-71-702(3), 39-71-703(6), 39-71-721(2), (3); Neb. Rev. Stat. § 48-121; *McGowan* v. *Lockwood*

Vermont, appears to apply the average weekly wage for the year in which benefits are formally "awarded," Vt. Stat. Ann. tit. 21 § 601(16), and Vermont's law is a poor analogy because, unlike the Longshore Act, it provides for annual adjustments to an employee's maximum compensation rate, *id.* § 650(d); Vt. Admin. Code 13-4-1:16.2000.

There is thus no merit to *amicus* AAJ's argument that state workers' compensation laws cap benefits based on the year in which a compensation order issues.[12] AAJ Br. 16–17. Nor is there merit to AAJ's

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Corp., 511 N.W.2d 118, 122 (Neb. 1994); Nev. Rev. Stat. §§ 616A.065, 616C.425; N.H. Rev. Stat. Ann. §§ 281-A:28(II), 281-A:28-a(II); N.J. Stat. Ann. § 34:15-12; N.J. Admin. Code § 12:235-1.6(b); N.M. Stat. Ann. §§ 52-1-41(F), 52-1-48; N.C. Gen. Stat. § 97-29; Ohio Rev. Code Ann. § 4123.62(C); Okla. Stat., tit. 85, § 308(43); Or. Rev. Stat. § 656.005(1); R.I. Gen. Laws § 28-33-17; *Cogswell* v. *Max Silverstein & Sons*, 488 A.2d 732, 733 (R.I. 1985); S.C. Code Ann. §§ 42-9-10(A), 42-9-20; S.D. Codified Laws § 62-4-3.1; Tex. Lab. Code Ann. § 408.061(g); Utah Code Ann. §§ 34A-2-410(1)(a)(i), 34A-2-411(1)(a), 34A-2-412(3)(a), 34A-2-413(2)(a); Va. Code Ann. § 65.2-500(B); Wash. Rev. Code §§ 51.32.060(5)(a), 51.32.080(6), 51.32.090(9)(a); *Cena* v. *Dep't of Labor & Indus.*, 91 P.3d 903, 919–22 (Wash. Ct. App. 2004); W. Va. Code §§ 23-4-6, 23-4-14(a); Wis. Stat. § 102.11(1); Wy. Stat. § 27-14-403(c).

[12] None of AAJ's cited authorities so holds. Florida caps compensation based on "the year in which the injury occurred," Fla. Stat. § 440.12(2)(a); the cited case addresses an inapposite question about offsets and supplemental benefits for permanent total disabilities, *Americana Dutch Hotel* v. *McWilliams*, 733 So.2d 536 (Fla. Dist. Ct. App. 1999). Likewise, *Dunbar* v. *Tammelleo*, 673 A.2d 1063 (R.I. 1996), is about a bonus incentive provision that was repealed during the pendency of the claim and has nothing to do with the general rule governing maximum rates in Rhode Island. *See also supra*, n.11. And Idaho allows maximum rates for some disabilities to increase annually, *see* Idaho Code Ann. §§ 72-409, -413, but for other disabilities fixes the maximum at a percentage of the state's average weekly

argument that the Report of the National Commission on State Workmen's Compensation Laws supports that interpretation. *Id.* at 16. The Report recommended that "'the maximum be linked to the State's average weekly wage for the latest available year,'" *id.*, but did not specify whether that meant the latest available year at the time the employee becomes disabled or at the time when a compensation order issues. It thus has no relevance here.

6. The Court should also reject AAJ's argument that the Longshore Act's purpose requires that the maximum compensation rate turn on the date of the compensation order. In support of this argument, AAJ makes three points, none of which has merit.

First, AAJ argues that because workers' compensation laws are designed to support injured workers during their disability rather than to make them whole, "[t]he relevant baseline for determining the appropriate amount for the claimant's support is not the date of injury," but "instead the date of the compensation order." AAJ Br. 14–16. It is not clear why AAJ believes this conclusion follows from its premise, but it does not matter because Congress clearly disagreed when it made the time of injury the relevant time for determining benefits under the Act.

Second, AAJ argues that basing the maximum compensation rate on the date the employee becomes disabled gives employers an incentive to contest liability and delay payment. *Id.* at 17–22. As discussed above, the Act already addresses employer delay, and Section 6(c) is not an appropriate vehicle to address that concern. See *supra*, 40–41. In any event, Roberts's interpretation would create an equal

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wage "for the year of the injury," *id.* § 72-429; *Vincent* v. *Dynatec Mining Corp.*, 969 P.2d 249, 251 (Idaho 1998).

and opposite incentive for employees to delay proceedings to obtain higher compensation rates, so this consideration is at best neutral.

Third, AAJ "retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Newport News*, 514 U.S. at 135. AAJ Br. 13–14. This is nothing more than a naked plea to adopt Roberts's interpretation because it is more favorable to the employee here.[13] As this Court has recognized, however, the Longshore Act "was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen*, 461 U.S. at 636; see also *Potomac Elec.*, 449 U.S. at 282 (the Longshore Act "represents a compromise between the competing interests of disabled laborers and their employers"). The statute's general purpose thus provides no guidance as to the meaning of Section 6(c).

7. Finally, there is no merit to AAJ's contention that the legislative history supports Roberts's interpretation. AAJ Br. 11–12. The passage from the House committee report AAJ cites is irrelevant because it addresses employees and survivors receiv-

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[13] In fact, accepting Roberts's view that "award" refers to a compensation order throughout the Longshore Act—while it would benefit Roberts in this particular case—would produce unfavorable results for employees in some other circumstances. It would mean, for example, that only those employees who had obtained compensation orders would have been entitled to the upward adjustment under Section 10(h)(1). *See supra*, 23–24. And survivors of employees who had not obtained compensation orders would not be entitled to the unpaid balance of the employee's award under Section 8(d). *See supra*, 22–23.

ing permanent total disability or death benefits—the only ones who receive "annual increases" in their maximum compensation rate (under Section 6(c)'s "currently receiving" clause). H.R. Rep. No. 92-1441, at 3 (1972).

The passage from the Senate committee report AAJ cites is likewise inapposite. It suggests that an employee is "newly awarded compensation" when he "begin[s] receiving compensation for the first time." S. Rep. No. 92-1125, at 18. But no party argues that receipt of payment is the relevant time under Section 6(c)'s "newly awarded" clause. To the extent the Senate report is relevant, it supports the Director's interpretation, because "the Act expects employees entitled to compensation to receive payment during their period of disability," regardless of whether they obtain a compensation order. Pet. App. 11 (citing §§ 904(a), 914(a)).

II. THE DIRECTOR'S INTERPRETATION OF SECTION 6(c) IS REASONABLE AND ENTITLED TO DEFERENCE.

After applying the ordinary tools of statutory interpretation, the intent of Congress is clear: An employee is "newly awarded compensation" under Section 6(c) in the year he becomes entitled to compensation under the Act. That should end the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see also *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (ambiguity in isolated term or phrase may be clarified by its context and place in overall statutory scheme). To the extent that any ambiguity remains, however, the Director of the Office of Workers' Compensation Programs is entitled

to resolve that ambiguity, and this Court should defer to his reasonable interpretation. See *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Barnhart* v. *Walton*, 535 U.S. 212, 217–18 (2002).

1. The Director, as delegatee of the Secretary of Labor, is charged with administering and enforcing the Longshore Act.[14] § 939(a); 20 C.F.R. § 701.201; *Newport News*, 514 U.S. at 130–31. In performing these functions, the Director is empowered to issue binding interpretations of the Act. *Newport News*, 514 U.S. at 134 (the Director has "power to resolve legal ambiguities in the statute"). Congress expressly delegated interpretive authority to the Director by authorizing him "to make such rules and regulations . . . as may be necessary in the administration" of the Act. § 939(a); see also *Newport News*, 514 U.S. at 130–31 (the Director is responsible for, among other things, "supervising, administering, and making rules and regulations for calculation of benefits and processing of claims").

The Director also plays a "significant role" in adjudicating claims for compensation under the Act. *Ingalls Shipbuilding, Inc.* v. *Dir., OWCP*, 519 U.S. 248, 262 (1997). Acting under the Director's authority, district directors informally adjudicate compensation claims when, as is generally the case, the matter can be resolved without a formal hearing. See § 919(c); 20 C.F.R. § 702.311 *et seq.*; *Ingalls*, 519 U.S. at 262–63.[15] These proceedings may result in

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[14] For ease of exposition, the Director will hereafter be referred to as the statutory recipient of the powers and duties the Act confers on the Secretary.

[15] The Longshore Act assigns the power to formally adjudicate compensation claims to administrative law judges, whose

binding compensation orders that carry the same legal consequences as compensation orders issued after a formal adjudication. See, *e.g.*, § 914(f) (late payment under compensation order triggers 20% penalty); § 918 (default on compensation order triggers right to supplementary order enforceable in district court); § 933(b) (acceptance of payment under compensation order triggers assignment of rights to employer). In addition, when a formal hearing is required before an administrative law judge or the Benefits Review Board, the Director may appear and participate in the proceeding as an interested party. 20 C.F.R. § 702.333(b); *Ingalls*, 519 U.S. at 263.

Accordingly, there is no question that Congress granted the Director power to make rules carrying the force of law, and thereby delegated to him authority to resolve statutory ambiguities. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

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decisions are subject to review by the Benefits Review Board. §§ 919(d), 921(b); *see Ingalls*, 519 U.S. at 262; *Newport News*, 514 U.S. at 125. The Board is a sub-agency within the Department of Labor whose members are appointed by the Secretary. *See Ingalls* 519 U.S. at 267–68 (describing the Longshore Act's "split-function regime"). Although the Board decides questions of law in the course of adjudicating claims, ultimate interpretive authority rests with the Director, who has "full power to alter" legal rules adopted by the Board. *Newport News*, 514 U.S. at 134; *see also Potomac Elec.*, 449 U.S. at 278 n.18 ("the Benefits Review Board is not a policymaking agency"); *cf. Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152–54 (1991).

2. The Director has exercised his interpretive authority in a manner that warrants judicial deference. Acting pursuant to his authority as administrator and enforcer of the Longshore Act, the Director has appeared before the Benefits Review Board in a formal adjudication and taken the official position that an employee is "newly awarded compensation" under Section 6(c) "when the disability commences," which is generally "when the injury occurs." *Reposky*, 2006 WL 3101750, at *12. As the Director explained, this interpretation is consistent with the statute's text, "maintains consistency in the statute and yields rational results." *Id.* at *13. Moreover, long before *Reposky*, district directors applied this interpretation when informally adjudicating claims under Section 19(c). See Dep't of Labor, Pam. LS-560, *Workers' Compensation under the Longshoremen's Act* (rev'd Nov. 1979) ("compensation payable under the Act may not exceed 200% of the national average weekly wage, applicable at the time of injury").

These forms of administrative action are sufficiently formal and deliberative to merit *Chevron* deference. They are not mere litigating positions. As this Court held in closely analogous circumstances, although "statutory and regulatory interpretations furnished" by appellate counsel "for the first time in the reviewing court" are not entitled to deference, that rule does not apply when an agency administrator advances an interpretation "in an administrative adjudication." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156–57 (1991). Here, as in *Martin*, the interpretation the Director advanced to the Board in *Reposky* "*is* agency action, not a *post hoc* rationalization of it," and "is as much an exercise of delegated lawmaking powers as is the

[Director's] promulgation of a [regulation]."[16] *Id.* at 157. See *Gilliland* v. *E.J. Bartells Co.*, 270 F.3d 1259, 1262 (9th Cir. 2001) (holding that the Director's statutory interpretations advanced to the Board in administrative adjudications are entitled to *Chevron* deference); *Mallott & Peterson* v. *Dir., OWCP*, 98 F.3d 1170, 1172 (9th Cir. 1996) (same); *Dir., OWCP* v. *Gen. Dynamics Corp.*, 982 F.2d 790, 793–95 (2d Cir. 1992) (same).[17]

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[16] Although *Martin* involved an interpretation of a regulation rather than a statute, the Court's analysis did not turn on that distinction. Rather, the Court deferred to the Secretary's interpretation because the Secretary's position before the Commission was "an exercise of the agency's delegated lawmaking powers," 499 U.S. at 157—a rationale that applies equally to interpretations of a statute. *Cf. Mead*, 533 U.S. at 226–27 (*Chevron* applies when the agency interpretation was promulgated in the exercise of delegated lawmaking powers).

[17] The Board in *Reposky* adopted the Director's interpretation of Section 6(c). In a pre-*Chevron* case, this Court stated that the Board is not entitled to judicial deference because it lacks policymaking authority. *Potomac Elec.*, 449 U.S. at 278 n.18; *see also Cowart*, 505 U.S. at 476 (noting Cowart's concession that the Board's position was not entitled to deference). The Board's lack of policymaking authority suggests courts should defer to the Director's interpretation over the Board's in the event the two conflict. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 198 (5th ed. 2010); *cf. Martin*, 499 U.S. at 152–54. Where, as here, the Director and Board concur, the agency has spoken with one voice, further strengthening the case for deference. *See Molineaux* v. *United States*, 12 F.3d 264, 267–68 (D.C. Cir. 1994) ("since the Board approved the Secretary's statutory interpretation, it is basically the Secretary's interpretation that is before us buttressed by the deference *Chevron* requires us to afford"); *Norfolk & W. Ry.* v. *Roberson*, 918 F.2d 1144, 1147 (4th Cir. 1990); *cf. Ingalls*, 519 U.S. at 268 ("an order of the agency's designated adjudicator is in reality an order of the agency itself").

Likewise, when embodied in a compensation order issued by a district director under Section 19(c), "the [Director's] interpretation assumes a form expressly provided for by Congress." *Martin*, 499 U.S. at 157; see also *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) ("[T]he ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority."). Deference is no less appropriate here than in past cases in which this Court has deferred to agency interpretations embodied in informal adjudications. See, *e.g.*, *NationsBank of N.C.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995); *Pension Benefit Guarantee Corp.* v. *LTV Corp.*, 496 U.S. 633, 647–48 (1990); see also 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 184 (5th ed. 2010) (noting that this Court "has consistently applied *Chevron* deference to statutory interpretations adopted in less formal instruments like orders issued in informal adjudications").[18]

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[18] Although *Mead* described notice-and-comment rulemaking and formal adjudication as prototypical examples of agency actions entitled to *Chevron* deference, 533 U.S. at 230, it did not overrule any prior cases granting *Chevron* deference to informal adjudications or otherwise suggest that informal adjudications are categorically ineligible for *Chevron* deference. After *Mead*, lower courts continue to give *Chevron* deference to agency interpretations embodied in informal adjudications in a wide variety of circumstances. *See, e.g.*, *Menkes* v. *U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 331–33 (D.C. Cir. 2011); *Vill. of Barrington, Ill.* v. *STB*, 636 F.3d 650, 658–59 (D.C. Cir. 2011); *Am. Fed'n of Gov't Employees* v. *Nicholson*, 475 F.3d 341, 354 (D.C. Cir. 2007); *Groff* v. *United States*, 493 F.3d 1343, 1349–52 (Fed. Cir. 2007); *Cleveland Nat'l Air Show, Inc.* v. *Dep't of Transp.*, 430 F.3d 757, 763–64 (6th Cir. 2005); *Pharm. Research*

For these reasons, the absence of a regulation does not undermine the case for *Chevron* deference. This Court has repeatedly "denied the suggestion" that *Chevron* deference requires notice-and-comment rulemaking. *Walton*, 535 U.S. at 222; see also *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (*Chevron* deference "does not necessarily require an agency's exercise of express notice-and-comment rulemaking power"); *Mead*, 533 U.S. at 231 ("the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"); *Brand X*, 545 U.S. at 1004 (Breyer, J., concurring).

Moreover, although the Director has not promulgated a regulation, he has effectively achieved the same result by persuading the Board to adopt his interpretation in a formal adjudication that operates as a binding precedent on future ALJ decisions. Particularly given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time," "*Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Walton*, 535 U.S. at 222.

3. The Director's interpretation is reasonable and entitled to deference. As explained above, Section 6(c)'s text can reasonably be read to cap compensation based on the national average weekly

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& Mfrs. of Am. v. *Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004); *Davis* v. *EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003); *Pesquera Mares Australes Ltda.* v. *United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001).

wage for the year in which an employee becomes entitled to benefits. And that interpretation best accords with the structure of the Act's compensation scheme; avoids leaving a major gap in the statute for employees who receive compensation without a compensation order; and ensures that similarly situated employees are treated the same. As a reasonable interpretation of a statute that he administers, the Director's interpretation controls. See, *e.g.*, *Nat'l Ass'n of Home Builders*, 551 U.S. at 666; *Brand X*, 545 U.S. at 980; *Barnhart* v. *Thomas*, 540 U.S. 20, 29 (2003); *Chevron*, 467 U.S. at 865–66.

4. At a minimum, the Director's interpretation is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The Director has extensive experience administering the Longshore Act and other disability compensation programs; Section 6(c) is central to the Act's administration; the Director's interpretation represents his longstanding and consistent position; and his interpretation is reasonable and consistent with the statutory framework. Regardless of whether it has power to control, the Director's interpretation is persuasive and rests on "a body of experience and informed judgment" that this Court should respect. *Id.* at 140; see also, *e.g.*, *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399–402 (2008); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487–88 (2004); *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 449 (2003); *Mead*, 533 U.S. at 234–35; *Rambo*, 521 U.S. at 136.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

LONGSHORE ACT PROVISIONS

33 U.S.C. § 902. Definitions

When used in this chapter—

* * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

* * * *

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring

in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

* * * *

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

* * * *

33 U.S.C. § 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee—

(A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a State workers' compensation law.

* * * *

33 U.S.C. § 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C. § 908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subsection, not amounting to permanent total disability, the award of compensation shall be for the

loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subsection shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

(d)(1) If an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower,

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares,

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 909(d) of this title (other than

a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 909(d) of this title, but if the aggregate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) of this section if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury,

the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

(2)(A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title.

(B) After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim, retain access to all records relating to the claim, and in all other respects retain all rights granted under this chapter prior to cessation of such payments.

(3) Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such

claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 939(c) of this title, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 944 of this title.

(h) The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

(i)(1) Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the

settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

(2) If the deputy commissioner disapproves an application for settlement under paragraph (1), the deputy commissioner shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this chapter. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

(4) The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

(j)(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who—

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

33 U.S.C. § 909. Compensation for death

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child

shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each

parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subsection exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but—

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of

the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

33 U.S.C. § 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in

the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d)(1) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs—

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable at the time of the injury.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of--

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

(g) The weekly compensation after adjustment under subsection (f) of this section shall be fixed at the nearest dollar. No adjustment of less than $1 shall be made, but in no event shall compensation or death benefits be reduced.

(h)(1) Not later than ninety days after October 27, 1972, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 906(b) of this title and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following October 27, 1972, and

(B) subtracting therefrom the compensation to which such employee or survivor was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this chapter at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following October 27, 1972. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this title, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date.

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately

result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. § 913. Filing of claims

(a) Time to file

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

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33 U.S.C. § 914. Payment of compensation

(a) Manner of payment

Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) Period of installment payments

The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Notification of commencement or suspension of payment

Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) Right to compensation controverted

If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) Additional compensation for overdue installment payments payable without award

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid install-

ment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Additional compensation for overdue installment payments payable under terms of award

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

(g) Notice of payment; penalty

Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) Investigations, examinations, and hearings for controverted, stopped, or suspended payments

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Deposit by employer

Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) Receipt for payment

An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

33 U.S.C. § 915. Invalid agreements

(a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1,000.

(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

33 U.S.C. § 918. Collection of defaulted payments; special fund

(a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or[1] a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the

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[1] So in original. Probably should read "for".

amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter,

and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may by a proceeding in the name of the Secretary of Labor under this section or under subsection (c) of section 921 of this title, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

33 U.S.C. § 919. Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribeed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Notice of claim

Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant),

whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) Investigations; order for hearing; notice; rejection or award

The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subsection (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a[1] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on

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[1] So in original. Probably should be "an".

October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) Filing and mailing of order rejecting claim or making award

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) Awards after death of employee

An award of compensation for disability may be made after the death of an injured employee.

(g) Transfer of case

At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) Physical examination of injured employee

An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be

suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

33 U.S.C. § 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of

law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary

members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

33 U.S.C. § 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation

within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the

amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

* * * *

33 U.S.C. § 932. Security for compensation

(a) Every employer shall secure the payment of compensation under this chapter—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; or

(2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay

such compensation directly. The Secretary may, as a condition to such authorization, require such employer to deposit in a depository designated by the Secretary either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the Secretary, based on the employer's financial condition, the employer's pre-vious record of payments, and other relevant factors, and subject to such conditions as the Secretary may prescribe, which shall include authorization to the Secretary in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this chapter. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(b) In granting authorization to any carrier to insure payment of compensation under this chapter the Secretary may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of compensation under this chapter in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this chapter. The Secretary may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No

suspension or revocation shall affect the liability of any carrier already incurred.

33 U.S.C. § 933. Compensation for injuries where third persons are liable

* * * *

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

* * * *

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect

the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 939. Administration by Secretary

(a) Prescribing rules and regulations; appointing and fixing compensation of employees; making expenditures

Except as otherwise specifically provided, the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subsection (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chapter shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers therefor approved by the Secretary.

* * * *

REGULATIONS

20 C.F.R. § 701.201. Office of Workers' Compensation Programs.

The Office of Workers' Compensation Programs is responsible for administering the LHWCA and its extensions.

20 C.F.R. § 701.301. Definitions and use of terms.

(a) As used in this subchapter, except where the context clearly indicates otherwise:

* * * *

(7) District Director means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized to perform functions with respect to the processing and determination of claims for compensation under the LHWCA and its extensions as provided therein and under this subchapter. The term District Director is substituted for the term Deputy Commissioner used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

* * * *

20 C.F.R. § 702.105. Use of the title District Director in place of Deputy Commissioner.

Wherever the statute refers to Deputy Commissioner, these regulations have substituted the term District Director. The substitution is purely an administrative one, and in no way effects the authority of or the

powers granted and responsibilities imposed by the statute on that position.

20 C.F.R. § 702.301. Scope of this subpart.

The regulations in this subpart govern the adjudication of claims in which the employer has filed a notice of controversion under § 702.251, or the employee has filed notice of contest under § 702.261. In the vast majority of cases, the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law. Such problems seldom require resolution through formal hearings, with the attendant production of expert witnesses. Accordingly, by § 702.311 et seq., the district directors are empowered to amicably and promptly resolve such problems by informal procedures. Where there is a genuine dispute of fact or law which cannot be so disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at § 702.331. Supplementary compensation orders, modifications, and interlocutory matters are governed by regulations beginning with § 702.371. Thereafter, appeals from compensation orders are discussed beginning with § 702.391 (the regulations of the Benefits Review Board are set forth in full in part 802 of this title).

20 C.F.R. § 702.311. Handling of claims matters by district directors; informal conferences.

The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discus-

sions by telephone or by conferences at the district director's office. Some cases will be handled by written correspondence. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a full written record be made of the matters discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

20 C.F.R. § 702.312. Informal conferences; called by and held before whom.

Informal conferences shall be called by the district director or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the district director, except that a compensation order following an agreement shall be issued only by a person so designated by the Director to perform such duty.

20 C.F.R. § 702.313. Informal conferences; how called; when called.

Informal conferences may be called upon not less than 10 days' notice to the parties, unless the parties agree to meet at an earlier date. The notice may be given by telephone, but shall be confirmed by use of a written notice on a form prescribed by the Director. The notice shall indicate the date, time and place of the conference, and shall also specify the matters to

be discussed. For good cause shown conferences may be rescheduled. A copy of such notice shall be placed in the administrative file.

20 C.F.R. § 702.314. Informal conferences; how conducted; where held.

(a) No stenographic report shall be taken at informal conferences and no witnesses shall be called. The district director shall guide the discussion toward the achievement of the purpose of such conference, recommending courses of action where there are disputed issues, and giving the parties the benefit of his experience and specialized knowledge in the field of workmen's compensation.

(b) Conferences generally shall be held at the district director's office. However, such conferences may be held at any place which, in the opinion of the district director, will be of greater convenience to the parties or to their representatives.

20 C.F.R. § 702.315. Conclusion of conference; agreement on all matters with respect to the claim.

(a) Following an informal conference at which agreement is reached on all issues, the district director shall (within 10 days after conclusion of the conference), embody the agreement in a memorandum or within 30 days issue a formal compensation order, to be filed and mailed in accordance with § 702.349. If either party requests that a formal compensation order be issued the district director shall, within 30 days of such request, prepare, file, and serve such order in accordance with § 702.349. Where the problem was of such nature that it was resolved by telephone discussion or by exchange of

written correspondence, the parties shall be notified by the same means that agreement was reached and the district director shall prepare a memorandum or order setting forth the terms agreed upon. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

(b) Where there are several conferences or discussions, the provisions of paragraph (a) of this section do not apply until the last conference. The district director shall, however, prepare and place in his administrative file a short, succinct memorandum of each preceding conference or discussion.

20 C.F.R. § 702.316. Conclusion of conference; no agreement on all matters with respect to the claim.

When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the district director shall bring the conference to a close, shall evaluate all evidence available to him or her, and after such evaluation shall prepare a memorandum of conference setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the district director whether they agree or disagree with his or her recommendations. If they agree, the district director shall proceed as in § 702.315(a). If

they disagree (Caution: See § 702.134), then the district director may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (See § 702.317, §§ 702.331–702.351).

20 C.F.R. § 702.317. Preparation and transfer of the case for hearing.

A case is prepared for transfer in the following manner:

(a) The district director shall furnish each of the parties or their representatives with a copy of a prehearing statement form.

(b) Each party shall, within 21 days after receipt of such form, complete it and return it to the district director and serve copies on all other parties. Extensions of time for good cause may be granted by the district director.

(c) Upon receipt of the completed forms, the district director, after checking them for completeness and after any further conferences that, in his or her opinion, are warranted, shall transmit them to the Office of the Chief Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearing (exclusive of X-rays, slides and other materials not suitable for mailing which may be offered into evidence at the time of hearing); the materials transmitted shall not include any

recommendations expressed or memoranda prepared by the district director pursuant to § 702.316.

(d) If the completed pre-hearing statement forms raise new or additional issues not previously considered by the district director or indicate that material evidence will be submitted that could reasonably have been made available to the district director before he or she prepared the last memorandum of conference, the district director shall transfer the case to the Office of the Chief Administrative Law Judge only after having considered such issues or evaluated such evidence or both and having issued an additional memorandum of conference in conformance with § 702.316.

(e) If a party fails to complete or return his or her pre-hearing statement form within the time allowed, the district director may, at his or her discretion, transmit the case without that party's form. However, such transmittal shall include a statement from the district director setting forth the circumstances causing the failure to include the form, and such party's failure to submit a pre-hearing statement form may, subject to rebuttal at the formal hearing, be considered by the administrative law judge, to the extent intransigence is relevant, in subsequent rulings on motions which may be made in the course of the formal hearing.

(Approved by the Office of Management and Budget under control number 1215-0085)

20 C.F.R. § 702.318. The record; what constitutes; nontransferability of the administrative file.

For the purpose of any further proceedings under the Act, the formal record of proceedings shall consist of

the hearing record made before the administrative law judge (see § 702.344). When transferring the case for hearing pursuant to § 702.317, the district director shall not transfer the administrative file under any circumstances.

20 C.F.R. § 702.319. Obtaining documents from the administrative file for reintroduction at formal hearings.

Whenever any party considers any document in the administrative file essential to any further proceedings under the Act, it is the responsibility of such party to obtain such document from the district director and reintroduce it for the record before the administrative law judge. The type of document that may be obtained shall be limited to documents previously submitted to the district director, including documents or forms with respect to notices, claims, controversions, contests, progress reports, medical services or supplies, etc. The work products of the district director or his staff shall not be subject to retrieval. The procedure for obtaining documents shall be for the requesting party to inform the district director in writing of the documents he wishes to obtain, specifying them with particularity. Upon receipt, the district director shall cause copies of the requested documents to be made and then:

(a) Place the copies in the file together with the letter of request, and (b) promptly forward the originals to the requesting party. The handling of multiple requests for the same document shall be within the discretion of the district director and with the cooperation of the requesting parties.

20 C.F.R. § 702.333. Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.

REPLY BRIEF

RECORD
AND
BRIEFS

No. 10-1399

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., and KEMPER INSURANCE CO., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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U.S. Dep't of Labor, Employment Standards Admin., *Workers' Compensation Under the Longshoremen's Act* (1979) 3

ARGUMENT IN REPLY

Section 6(c) of the Longshore Act Unambiguously Makes the Time the Claimant Is "Newly Awarded Compensation," Not the Time He or She Is First Entitled to Compensation, the Determinant of the "Applicable" Limits on the Weekly Rate.

A. The Several Standards Proposed

The Director and Sea-Land actually suggest three different standards to replace the obvious and natural referent of the statutory standard for determining which year's maximum and minimum compensation rates apply to a claimant under Longshore Act § 6(c) – the fiscal year "during" which the claimant is "newly awarded compensation." They variously urge the time of the *injury*, without any basis in the statute, but to "harmonize" the relevant time for the § 10 average-wage basis of the compensation rate and the relevant time of the § 6(b) rate limits; the time of *onset of disability*, based on reading "compensation during such year" to mean "compensation *for disability beginning* during such year"; and the time the claimant first became *entitled* to compensation, or, as the Director now puts it, the time the claimant was first "awarded" compensation "by force of the Act," based on reading "awarded" to mean "granted by the terms of the Act." The Director even advances the only relevant sliver of legislative history – a single unelaborated sentence in a 1972 committee report – that states yet a fourth standard, the time the claimant "*begin[s] receiving* compensation for the first

time" (Br. for Resp. Dir. ("Dir. Br.") 42, *quoting* S. Rep. No. 92-1125 at 18 (1972)), although he does not support that standard.[1]

The Director acknowledges that the time of injury and the time of onset of disability occur in different fiscal years in a substantial number of cases, and disavows the former standard. Dir. Br. 30 n.9.[2] That disavowal is particularly significant for two reasons. First, the only evidence of even the least formal articulation by the Director of any rule on the subject, prior to the litigation before the Board in *Reposky v.*

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[1] The difference is illustrated in the common facts of *Boroski v. DynCorp Int'l*, No. 10-10033, 2011 WL 5555686, 2011 U.S. App. LEXIS 22900 (Nov. 16, 2011) (amending October 27, 2011 opinion in irrelevant respects). There no compensation was paid from the time of onset of total disability in FY 2002 until the ALJ's entry of an award in FY 2008, yet the Director contended that the FY 2002 maximum applied. He points out that the time-of-first-receipt standard is "irreconcilable with [Roberts's] interpretation," Dir. Br. 42 (*see also* Sea-Land Br. 46), but does not mention that it is just as irreconcilable with the Director's position. In cases like the present, where some compensation is received in the same fiscal year as that of the onset of disability and of the first entitlement, the committee report's standard would produce the same outcome as any of the Director's standards; in others, like *Boroski*, it would produce the same result as the reading urged by Roberts and found unambiguous by *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997), and by the *Boroski* court.

[2] The difference is elucidated by *Kubin v. Pro-Football, Inc.*, 29 Ben. Rev. Bd. Serv. (MB) 117 (1995) (five years between injury and onset of resulting disability), where the Board adopted the time of onset as the determinant, which the Director has supported.

Int'l Transportation Services, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), an informational pamphlet, states the time-of-injury standard. Dir. Br. 9, 46, *citing* U.S. Dep't of Labor, Employment Standards Admin., *Workers' Compensation Under the Longshoremen's Act* (1979); Sea-Land Br. 49 (same). And second, the Director does not acknowledge that the unavailability of a time-of-injury determinant alone violates the "harmony" and "uniformity" he seeks. Nor, in fact, does he acknowledge that there are differences between the time of onset of disability and the time of first entitlement to compensation or the time the claimant first receives any compensation.

Respondents attempt to cloak the time-of-onset reading with a heretofore absent fig leaf of textual plausibility by characterizing the claimant as "'newly awarded compensation' 'by force of the Act.'" Roberts agrees that this fiction, or something like it, underlies the reasoning of the court below. It is, however, both different from the time-of-onset rule and ambiguous. It entails either reference to the time of first *entitlement* or to the time the first payment of compensation without an award was *due*, in the absence of controversion, under § 14(a). The former, contrary to the Board's and the Director's careless references, is not at the time of the *first* disability, but only at the time of first disability *after three days'* disability have accrued. See § 6(a) (Dir. Br. App. 2a). Even in many of the "typical traumatic injury case[s]" to which the Director refers in discounting the difference between a time-of-injury rule and a time-of-onset rule, Dir. Br.

30 n.9, the time of onset of disability and the time the claimant first becomes entitled to any compensation, or is "awarded" it "by force of the Act," will be in different fiscal years. That difference will exist in something more than three of every 365 cases – all those in which immediately disabling injuries occur on the last three days of the fiscal year, and others in which the injury occurred earlier but disability was not immediate, or cumulated to more than three days episodically over a longer period. The time the first *payment is due*, under § 14(a) of the Act – fourteen days after the employer is aware of the injury, assuming the employer does not "controvert" its liability – will be in a different fiscal year in many more cases. If, as respondents' other central concern about the result of the ordinary meaning of § 6(c) – their shared concern for "harmonizing" § 6(c) with the Act's requirement of payments without claim or award in uncontroverted cases – suggests, a claimant is to be regarded as "newly awarded compensation by force of the Act" only when the first such *payment is due*, the applicable § 6(b) rate limits will be different from those at the time of the onset of disability in fourteen of every 365 cases, plus an additional number in which the employer did not become aware of the injury until a later date, as well as all those in which the employer "controverts" the claimant's rights at the outset.

Each of the alternative determinants put forth by respondents would produce the same result in *this* case. Although no award was entered on Roberts's

claim until FY 2007, his injury, the onset of his disability two weeks later, and the time he first became entitled to compensation under the Act three days after that, and also the time the first payment without an award fell due (and even the time the first payment was received), although all different, all occurred in FY 2002. But that does not permit respondents to sweep the differences among their proposed rules under the rug, pretending they are all the same, as they attempt to do in cumulating their arguments in support of one with arguments that could support only another. *See particularly* Dir. Br. 30 n.9 (Court "need not decide" between time of injury and time of onset). The question how § 6(c) should be read cannot be answered at this stage merely by acceptance of the Director's anything-but-time-of-award approach, even though that would be enough to resolve this individual case. Surely the Director must propose an articulable *statutory basis* for adoption of a *particular* standard, not merely a resolution of this case, before this Court; the Court can hardly approve an administrative construction that fails to *choose one referent* for the § 6(c) determination, which can be applied across common variations in timing.

It should be understood at the outset that respondents' alternative standards are not the same as one another, and that in presenting them as all the same just because each would produce the same outcome in this case, the Director still appears not to have thought through fully his administrative

construction of the statute. The date an "award" is first filed pursuant to § 19(e), urged by Roberts and held required by the clear terms of § 6(c) by the Fifth and Eleventh Circuits, has none of the ambiguities of the Director's shifting positions. Both the Director and Sea-Land contend that basing the applicable § 6(b) limits on the national average wage in effect at the same time as the claimant's own "average weekly wage" that is the basis of the rate before application of any limits, *i.e.*, the time of injury, in all cases is the only determinant that could make sense and be "harmonized" with the structure of the Act; but they recognize that such a rule is out of reach in any event, inasmuch as there is no textual basis for equating the time the claimant is "newly awarded compensation" with "the time of the *injury*."

B. A Claimant Is Not "Awarded Compensation" Within Any Provision of the Longshore Act When Entitlement Arises, But Only When an Award Is Filed under § 19(e).

Respondents attempt to minimize the critical functions of a compensation order under the Longshore Act. Sea-Land describes a "compensation order . . . making the award" under § 19(e) of the Act merely as "formally recognizing [the claimant's] right to compensation," Sea-Land Br. i; the Director likewise obscures the role of such an order by describing it as "a formal administrative order *specifying benefit levels* under the Act, see 33 U.S.C. 919(e)," Dir. Br. 6 (emphasis added). Section 19(e) describes a compensation

order instead as "the order denying the claim or *making the award*." Such an order does not merely "recognize" or "specify[] benefit levels" of the claimant's entitlement; among other functions (*see* Pet. Br. 23), it *establishes* the claimant's right, on pain of twenty-percent augmentation of any late payment, and makes the payments which it directs enforceable promptly in district court, under § 18(a) or § 21(d), until and unless it is supplanted by a later compensation order "modify[ing]" it under § 22. Any payments made before such a § 19(e) order is filed are explicitly and repeatedly denominated payments "without an award." The employer may stop such payments at any time at will; the claimant then has no remedy other than to await the outcome of litigation, and even then, so long as it files a simple notice-of-controversion form under § 14(e), the award will include nothing for the delay beyond the limited pre-award interest allowed, *see Price v. Stevedoring Services of Am.*, 627 F.3d 1145 (9th Cir. 2010), *reh'g en banc granted*, 653 F.3d 928 (2011). Only the security of an "award" under § 19(e) enables a disabled worker and his or her family to know how next week's groceries are going to be paid for.

The Director claims – despite his contrary acknowledgement until the decision of the court below (*see* Pet. Br. 21 n.11) – that "awarded" in § 6(c)'s phrase "is ambiguous," in that it can mean merely "conferred or bestowed upon," and that the "statutory context and role of the maximum compensation level in the statutory scheme" show that a claimant is

"newly awarded compensation" within the meaning of § 6(c) "when he is awarded compensation 'by force of the Act,' *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 456 (1947) – at the time of a disabling injury." Dir. Br. 15-16, 29-30 & n.9, 41; *cf. id.* 21. Sea-Land makes the same argument, adding a catalog of references by this Court and others to statutes that *grant rights* to various remedies as "award[ing]" those remedies. Sea-Land Br. 18-20 & nn.4, 5. *Porello*, in fact, did not refer to benefits being *awarded* "by force of the Act"; it said that "the employee . . . *receives* benefits quite soon after his injury by force of the Act" – but that description was qualified by the conditional clause in the previous sentence, "unless an employer controverts the right of the employee to receive compensation[.]" The figurative usage to which respondents point, though "perfectly acceptable English," Sea-Land Br. 19, is not even arguably the sense in which the word is used anywhere in the Longshore Act.

Both the Director (Br. at 23-24) and Sea-Land (Br. at 22-23) add a further provision of § 8 to the court of appeals's list of supposed uses of the term "award" that "could not have meant assigned by formal order . . . ," Pet. App. 6; *see* Pet. Br. 29-30. That addition serves only to demonstrate further the implausibility of the assertion that "award" is used to mean merely "entitlement" *anywhere* in the Act. Section 8(d)(1), as respondents point out, provides that "the amount of the award [for scheduled disability] unpaid at the time of death" is payable to specified

survivors. Respondents assert that since some claimants die while receiving compensation for such disabilities *without* an award having been entered, "[i]f petitioner's reading of ['award'] were correct, such an employee's survivors would not be entitled to [the] compensation" to which the worker had a right but had not yet been paid, which would be anomalous. Dir. Br. at 24; *see also* Sea-Land Br. at 22-23. But respondents ignore the companion provision of § 8(d)(3) that "[a]n *award* for disability may be made after the death of the injured employee." The survivors are fully entitled to pursue an *award*, in the sense in which that term is consistently used in the Act, for the disability if none has been made during the worker's life, and receive the part of the amount awarded that had not yet been paid at the time of death. Section 8(d)(3) is impossible to square with the Director's eleventh-hour discovery of an alternative meaning of "award" under which the "force of the Act" has "awarded" the injured worker compensation as soon as he or she is entitled to it. Obviously an "award" for disability in any such sense as respondents posit cannot "be made" after the worker's death; § 8(d)(3) rules out the respondents' reading of "award" in § 8(d).

Respondents' claims that the court of appeals was correct in citing the uses of "award" in a few other provisions of the Act as unmistakably requiring the figurative sense of the term that is equivalent to mere entitlement are no more valid. *See* Pet. Br. 29-31. In particular, the Director describes the disfigurement

provision of § 8(c)(20) as "requiring compensation to be 'awarded' for disfigurement without a formal compensation order," Dir. Br. 13, and as providing that "[u]nless the employer controverts liability, it is legally obligated to pay $7500 to an employee who suffered a 'serious disfigurement . . . , whether or not the employee has received a compensation order,'" *id.* 25. This is simply wrong.

First, § 8(c)(20) provides, not that disfigured claimants *are* "awarded" any amount, but that an amount up to $7,500 "*shall be* awarded" in such cases. *See also* § 8(c)(22), on which respondents and the court below also rely (in multiple-scheduled-injury cases "the award *shall be*" for each scheduled period of compensation, consecutively).

Second, contrary to the Director's second statement, the amount to "be awarded" under § 8(c)(20) is not $7,500, but an amount "*not to exceed*" that figure. The amount must be *fixed by an order*, and the employer is not "legally obligated" to pay any particular amount until it is fixed by such an "award." Indeed, unlike other compensation for which the Act provides, a lump sum for disfigurement is not payable "periodically" in the "installments" encompassed by § 14(a)-(b). Nothing in the Act establishes a time for the payment of a sum under § 8(c)(20), other than § 14(f), requiring payment of compensation "payable under the terms of an award within ten days after it becomes due," *i.e.*, after the § 19(e) compensation order

"making the award" is filed and hence "effective," § 21(a).[3] Section 8(c)(20) does not *make* any award "by force of the Act"; it provides that an amount "*shall be* awarded." It necessarily contemplates administrative action to fix the amount of the liability and direct its payment.

The final sentence of § 10(h)(1), relating to the small class of workers and survivors still receiving compensation in 1972 for pre-1947 injuries or deaths for which they were "*awarded* compensation at less than the maximum rate that was provided in this Act at the time of the injury," likewise does not imply the usage on which respondents rely. The reference to the time of the injury in the context of the maximum in *pre-1972* cases says nothing about the relevance of that time to the applicable maximum under *amended* § 6. On each previous occasion when the § 6(b) limits had been raised, the amending acts specified that the new limits were applicable only to injuries and deaths after their enactment. The 1972 revision of the rate-limits provision contained no such restriction, except such as is implicit in, and hence defined by, the provision for adjustments in some pre-1972 cases, § 10(h). What the reference to the time of injury in pre-1972 cases "makes clear," Dir. Br. 26, is only that Congress knew that the applicability of *previous* maximum and minimum rates had been determined

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[3] *See, e.g., Twine v. Locke*, 68 F.2d 712 (2d Cir. 1934) (compensation is "due" under an award when the award is "effective" under § 21(a), *i.e.*, filed under § 19(e)).

by the time of injury or death, pursuant to explicit provisions. And again, respondents do not even claim that § 6(c) can be read to impose a time-of-injury standard like those specified in previous rate-limit changes.

More broadly, even if some use of the term "award" or "awarded" in the Act could be thought to reflect the sense posited by respondents in which the *Act itself* "awards" compensation, § 6(c) could not be so read. The Act could only "award" compensation in that sense to disabled workers *generally*, not to any particular claimant in any particular amount. But § 6(c) focuses on the individual claimant – the time the "*employee*[is] newly awarded compensation." The legislative enactment may be loosely said to "award" compensation *generally*; but an individual worker thereafter first becomes *entitled to* it, and then is to be "awarded" it under § 19(e). Section 6(c), with its reference to the individual claimant, can only be read to refer to the last of these events.

C. The "Context" of Other Provisions of the Act Provides No Basis for Imparting a Different Meaning to "Awarded" in § 6(c).

Respondents' first central point is that because the claimant's own § 10 "average weekly wage" is determined as of the "time of the injury," § 6(c) "is thus logically read to apply to an initial benefit calculation the [§ 6(b) limits] that are likewise based on circumstances that existed at the time of the injury." Dir. Br.

31. But even aside from the fact that respondents *do not urge* a time-of-injury determinant, there is no necessary "logical" connection. Regardless of the Director's views on what legislative answer would *best* have been provided to the question what class of cases would be subject to a given year's limits under the new annually-adjusting § 6(b), Congress was free to make its own choice of a determinant, and it made no reference in the provision by which it made that choice to either the time of the injury or the time of first entitlement. Further, the § 6(b) limits for a given year do *not* reflect "circumstances that existed at the time of the injury." Because the "national average weekly wage" that prevails for a fiscal year under § 6(c) is based on data from the first three quarters of the *preceding* year (§ 6(b)(3)), the § 6(b) rate limits will always be based on prevailing wages during a period centered at least seven and a half, and as much as nineteen and a half, months before the time of reference for the § 10 wage-basis. Thus even a time-of-injury determinant would not provide quite the degree of symmetry between the two prongs of the rate determination that respondents claim to be looking for.

The other point of the Director's contention that the "context" of the Act is in conflict with reading the time a claimant is "newly awarded compensation" within the meaning of § 6(c) to refer to the time an award is filed under § 19(e) is his view that "it is logical" to treat payments "*without* an award" within the meaning of § 14 as "awarded" within § 6(c). He

bases this surprising assertion on the supposition that reference to the time an award is filed "would render [§ 6(b)-(c)] impossible to apply in the many Longshore Act cases in which the employer pays compensation [without an award, in accordance with § 14(a)-(b)], with no compensation order ever being issued." Dir. Br. 34. But the "long-settled practice" of the OWCP district directors in leaving injured workers without the security of awards *requiring* continued payments is a problem of the Director's own making, which can readily be solved for purposes of the relatively few maximum- and minimum-rate cases without any rule "that entry of compensation orders is compelled by the Act in every case in which compensation is paid."

The Director and Sea-Land ascribe to Roberts the view that this is indeed so compelled. Dir. Br. 36, *citing* Pet. Br. 29 n.16, 43; Sea-Land Br. 37. But each cited passage of Roberts's brief referred to undisputed *claims*, not "every case in which compensation is paid"; and the Director does not, and cannot, dispute that § 19(c) *directs* prompt entry of awards in such circumstances. The fact that for some decades the OWCP has *ignored* that direction hardly suggests that Congress legislated in § 6(c) with the current practice in mind. But whether or not the Act makes such entry a mandatory, ministerial duty with respect to uncontested claims, it certainly *permits* such

entry,[4] and the Director presents no basis on which the district director might *deny a demand* by a party for entry of an award under such circumstances. *Cf.* Dir. Br. 38-39 (§ 19(c) "cannot reasonably be read to require a district director to issue a formal compensation order even if the parties resolve their difference informally *and no party requests a compensation order.*") (emphasis added). Section 6(c) simply gives the employer an incentive, in cases subject to § 6(b) rate limits, to make such a demand, just as it has in the situation where it fears the time limitation on a third-party tort cause of action will expire before it can obtain an assignment of the claimant's unexercised right to pursue it, under § 33(b) (*see* Pet. Br. 28); the district directors must comply with such legitimate demands.

Even in cases in which a claim has *not* been filed because the claimant agrees that the payments the employer is making are what he or she is entitled to, although § 19(c) does not apply, there is no statutory *obstacle* to entry of awards of the agreed compensation currently payable. If there *is* some defect in such

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[4] *Compare Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 533 n.1 (1983) (unnecessary to decide in that case whether § 19(c) of the Act "requires the Deputy Commissioner to issue an order with respect to any uncontested compensation claim, as petitioner argues"), *with Czaplicki v. SS Hoegh Silvercloud*, 351 U.S. 525, 528 n.9 (1956) ("'if no hearing is ordered within twenty days' after notice of the claim is given to the employer and other interested parties, the Deputy Commissioner *can* decide the claim'") (emphasis added).

entry where no claim has been filed, of which the claimant would be entitled to complain by appeal (*but see Czaplicki*, *supra* n.4), we are unaware of any employer so dimwitted as to be unable to induce the claimant, who is receiving payments without an award at its sufferance, to file a claim (*e.g.*, "The enclosed is the last payment without an award we will make, and we will controvert your right to benefits, unless you file a claim by the time the next payment is otherwise due; enclosed for your convenience is a claim form."). We are likewise unaware that any claimant, other than the injured worker in *Czaplicki*, has ever complained about issuance of an order awarding the benefits that all agree are due, and thus rendering the right to their continuation promptly enforceable if the employer should attempt to change its mind prior to entry of a new order under § 22.

The Director's reference *in terrorem* to entry of awards "in every case in which compensation is paid" obviously misstates the burden that would be imposed in order to avoid the supposed problem with § 6(c)'s reference to the time of the award. The point affects *only* cases governed by the rate limits of § 6(b), a very small minority of cases. Although we submit that the Director's current manner of leaving cases in payment-without-award status does violate *all* claimants' rights to the relative security of continuing awards subject to § 22 modification, the present case is not an attempt to cure that aspect of the maladministration of the Act; it concerns only cases to

which § 6(c) pertains, and the OWCP's responsibility to act promptly on *employers'* demands for entry of awards on undisputed claims. The Director never quite brings himself to acknowledge that the Act provides for entry of awards not only to resolve *disputed* claims, but where the claimant's rights are acknowledged as well (and his regulations are entirely silent on the point), but he cannot and does not deny it.

The prompt availability of a § 19(e) award in an undisputed case upon the employer's request solves the problems with application of § 6(c) to such cases on which the Director relies. The Director can adopt the simple expedient of having his district directors enter awards promptly, without the need for any litigation, as directed by § 19(c), in any case in which the employer initially acknowledges its maximum- or minimum-rate liability, *promptly upon its request*, as contemplated by Congress. Presumably they will do so, in response to the Congressional "expect[ation]," *see* Pet. Br. 28, if the employer's reason for wanting an award entered in such a case is to start the time for an assignment of a third-party cause of action from the claimant to the employer under § 33(b) of the Act before the limitations period on such a cause of action expires, rather than to lock in the current year's maximum or minimum rate. There is no reason at all they cannot or should not do the same where the employer's request is motivated by § 6(c).

But neither achieving consistency of meaning among provisions with pointedly differing operative terms nor adherence to an administrative practice

that ignores a statutory direction is a policy goal the administrator is entitled to pursue in any event. Neither of respondents' bases for twisting the terms of § 6(c) out of their ordinary legal signification can justify treating either being entitled to compensation or receiving payments "without an award" as being "awarded compensation." An employee is "awarded compensation" only by "the award" entered under § 19(e).

D. Cognate State Laws Are Instructive Only in Showing that There Is a Wide Variety of Legislative Answers to the Question How the Applicable Rate Limits for Particular Cases Should Be Determined.

Sea-Land argues that "[s]tate laws . . . provide an informative backdrop" for consideration of the meaning of § 6(c) of the Longshore Act, and that "the vast majority of [such] laws apply the average weekly wage for the year in which the injury occurred." Sea-Land Br. 42, 42-44. First, of course, inasmuch as none of those laws is shown to include terms comparable or equivalent to those of § 6(c), they are unlikely to be "informative" concerning that provision. Laws to which Sea-Land makes no reference, however, demonstrate that, far from being even an *unlikely* intent (much less one "absurd" to ascribe to Congress), the determination of the applicable limit by reference to a time other than that of the injury, or the onset of disability – when the compensation is first awarded, or when it is paid in cases of delay, or when

a particular *class* of compensable *permanent* disability or impairment matures or is "determined" – is a feature of several states' workers'-compensation laws. *See, e.g., LeBrun v. Woonsocket Spinning Co.*, 106 R.I. 253, 258 A.2d 562, 564-65 (1969) (compensation for permanent disability held governed by benefit provisions in effect at time of permanency); *McLeod's (Dependent's) Case*, 14 Mass. App. 906, 436 N.E.2d 413 (1982), *aff'd*, 389 Mass. 431, 450 N.E.2d 612 (1983) (applying state's statute providing that "[i]n any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury."); *Hofmeister v. Workers' Comp. App. Bd.*, 156 Cal. App. 3d 848, 203 Cal. Rptr. 100 (1984) (state statute providing that current statutory rate rather than earlier rate governs temporary-disability "payment[s] made two years or more from the date of injury," held applicable to payments for *disability within* two years of injury that were not *made* until thereafter); *Gregory v. North Dakota Workmen's Compensation Bureau*, 369 N.W.2d 119, 122 (N.D. 1985) (awards for permanent partial impairment were required to be based on statutory weekly rate in effect at time extent of impairment is determined and award made); *Saari v. North Dakota Workmen's Compensation Bureau*, 598 N.W.2d 174 (N.D. 1999) (same under subsequent amendments to benefit provisions that allowed less than one-twentieth of the compensation payable under those in effect at time of injury and time disability

became permanent); *Appeal of Lorrette*, 154 N.H. 271, 910 A.2d 1155, 1157-58 (2006) (statutory amendment making *average weekly wage* at time of original injury applicable to permanent-impairment award did not change rule that *law* in effect at time *permanent impairment was "assessed,"* rather than that in effect at time of injury, governs such awards).

In view of the diversity of approaches, legislative and judicial, among different jurisdictions' compensation laws on the question what events determine the applicable benefit rates under what circumstances, the Board's and the Director's attempts to twist the statutory terms to accomplish the result they think would be the most administratively convenient, or even "logical," cannot remotely be justified on the ground that Congress *must* have meant to determine the applicable maximum under the automatically-adjusting-limits provision of Longshore Act § 6(b) by reference to when the claimant first *became entitled* to compensation for *some* class of disability. Their distortion of the statutory phrase would be ill-founded even if it were otherwise legitimate.

But in any event – even if the Act were *unique* in making the time compensation is "newly awarded" determinative – the attempt to avoid the natural signification of the statutory phrase is *not* legitimate. The terms of § 6(c) have a plain, common meaning that makes the critical factor the time when compensation is "newly awarded," rather than when the earliest period of *disability for which* it is so awarded began; and Roberts was in no sense "newly awarded"

compensation until FY 2007. It is the FY 2007 maximum that restricts the weekly rate of *all* the compensation he was "newly awarded during" that period.

E. The Degree of Respect Due to the Director's Position

This case presents little reason for the Court to consider the variety of factors that determine where on the continuum of judicial deference to an administrative agency's construction of a statute the Director's present positions on the best reading of Longshore Act § 6(c) should fall. First, the court of appeals's opinion did not touch on the point at all. Second, the circumstances of the Director's present position are extremely weak for *any* claim of deference. That position is not the same as that stated in the pamphlet that is all the Director can adduce as evidence of a longstanding agency construction, nor is it even the same as the basis of construction he advanced in the litigation of *Reposky* or the present case, until the court of appeals adopted an entirely distinct analysis and basis for essentially the same determinant, which counsel for the Director now urge despite the fact that it plainly was not the basis on which the Director adopted the position. The Director's present assertion that "awarded" is ambiguous is not even agency "appellate counsel's *post hoc* rationalization" for agency result based on an entirely different theory, but a position the Director *disavowed* throughout that litigation until the decision of the court of appeals; "[d]eference to what appears to be

nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). The Director cites nothing at all, and provides no rationale, in support of his assertion that "[t]he fact that the Director in *Reposky* [as well as below] advocated a different textual route to the same ultimate conclusion is of no import," Dir. Br. 46. Further, "the nature of the legal question" presented is not "interstitial" but addressed directly by the terms of § 6(c); it does not implicate "related expertise of the Agency"; and there is no indication of "careful consideration by the Agency . . . over a long period of time," *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). And finally, because of the division of responsibility between the administrator and the quasi-independent adjudicatory tribunals before whom the Director appears as a litigant since the 1972 revision of the Act's adjudication provisions, the Director is without authority either to adjudicate disputed issues or even to *institute* litigation (or, generally, to invoke the courts of appeals' review jurisdiction when the Board rejects his positions, *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 514 U.S. 122 (1995)), and there is no basis to believe that the position he advances was developed, like those of an *adjudicatory*-administrative body, after consideration of input from affected parties.

To be sure, "the Director's reasonable interpretation of the Act brings at least some added persuasive force" to that interpretation. *Metropolitan Stevedore*

Co. v. Rambo, 521 U.S. 121, 136 (1997). The Director's institutional awareness of the recurring fact patterns of many thousands of cases, litigated and otherwise, qualifies his view of how a broad statutory term or phrase may best be read, in light of the effects of competing constructions that are often not apparent to generalist courts, to judicial "respect," but only proportional to its power to convince. But the ramifications of a ruling one way or another on the referent of "awarded" in § 6(c) are not complex or obscure, and the Director brings no identifiable administrative experience to bear on the question. The only point of statutory or administrative policy he adduces in opposition to the natural meaning of "newly awarded compensation" is the contention that it would encourage employers to litigate otherwise undisputed claims – but it simply is not so, since a dispute or litigation is not a condition required for entry of a § 19(e) award. Even the strongest version of judicial deference to administrative constructions does not come into play unless the Court agrees that the statute in question *is ambiguous*, and § 6(c) is not.

CONCLUSION

The Court should reverse the decisions below and modify the award to run at the FY 2007 maximum rate.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

No. 10-1399

IN THE

Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., AND KEMPER INSURANCE CO., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae* in support of the Petitioner. Letters from the parties giving consent to the filing of this amicus brief accompany this filing.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Many AAJ attorneys represent injured workers entitled to pursue their legal remedies under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 44 Stat. 1424, as amended, 33 U.S.C. §§ 901-950. They also represent injured workers under the Defense Base Act, 42 U.S.C. §§ 1651–55, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c), and Federal Employees Compensation Act, 5 U.S.C. §§ 8171-93, to whom Congress has extended LHWCA benefits.

AAJ believes that the lower court erred in its construction of the maximum disability benefit payable to Petitioner in this case. The interpretation rendered by the court below is not only at odds with the plain text of the LHWCA, it undermines the Act's purpose of providing prompt and certain compensation to injured workers.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

SUMMARY OF ARGUMENT

The question presented, interpreting the statutory ceiling on disability benefits provided by the Longshore and Harbor Workers' Compensation Act, is a matter of great importance to workers covered by the Act, including not only maritime workers within the federal admiralty jurisdiction, but also many workers to whom Congress has extended Longshore benefits.

The lower court erred in stating that Congress did not define the statutory term "awarded." In fact, § 19(e) expressly states that an award is referred to in the Act as a "compensation order." Moreover, the lower court's definition—"entitled to"—cannot logically be substituted in other provisions where "awarded" appears. It also required the court to equate "receiving compensation" with "entitled to, even if not receiving compensation." The provisions relied upon by the lower court do not use the term definitionally and do not equate "award" with the mere fact of injury.

This Court has held that the plain meaning of the term "award" in a legal context denotes a judicial determination.

The legislative history of the provision clearly indicates that Congress equated "newly awarded compensation" with "receiving compensation for the first time."

The lower court's interpretation also undermines the policy and purpose of the LHWCA. This Court has consistently instructed that the Act be liberally construed to achieve its compensatory purpose.

The purpose of tort actions is to make the wrongfully injured person whole again, insofar as a monetary judgment can do so. The date of injury is, therefore, the reference point for damages. The purpose of workers' compensation, including the LHWCA, is not to restore the status quo pre-injury. It is to provide limited support during recovery. The date of injury has no logical connection to that determination. The proper baseline consistent with the purpose of the statute is the date of the actual award.

In addition, the lower court's interpretation undermines the goal of providing prompt and certain compensation to covered workers. The assurance of prompt and certain compensation was an essential part of the workers' compensation "bargain" which justified eliminating the worker's common-law tort remedy.

Under the lower court's interpretation, an employer/carrier, presented with a disability claim by an employee earning twice the national average wage, would be assured that its liability had already been capped as of the date of injury. The employer/carrier would have a financial incentive to controvert liability and delay payment in the hope that the injured worker, unable to work and facing mounting bills, will agree to a small settlement. Congress could not have intended such a harsh result.

ARGUMENT

I. THE LHWCA PROTECTS A SUBSTANTIAL NUMBER OF AMERICAN WORKERS.

The Court is here presented with interpreting a statute of great importance to American workers. Congress enacted the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901-950 ["LHWCA" or "the Act"] in 1927 to provide nonseaman maritime workers with medical benefits and compensation for temporary or permanent loss of earning capacity due to accidental injury, death, or occupational disease "arising out of and in the course of employment." *Id.* at § 902(2). Covered workers are entitled to these benefits irrespective of fault on the part of the employer. *Id.* at § 904(b). In return, the employer's liability under the Act is "exclusive and in place of all other liability." *Id.* at § 905(a).

In short, Congress under its admiralty power enacted the LHWCA to accomplish for nonseaman maritime workers "the same general purpose as the Workmen's Compensation Laws of the states." *Crowell v. Benson*, 285 U.S. 22, 40 (1932). *See also Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 257 (1977) (Congress enacted the LHWCA as "the only way to provide workmen's compensation for longshoremen and harborworkers.").

This Court's interpretation of the LHWCA also affects many other workers. For example, the Defense Base Act, 42 U.S.C. §§ 1651–55, extends coverage under the LHWCA to private civilians performing work for the United States in other

countries. *See, e.g., Boroski v. DynCorp Int'l*, No. 11-10033, 2011 WL 5555686, at *1 n.1 (11th Cir. Nov. 16, 2011). Among those workers are contractors working on U.S. military installations and projects in Iraq and Afghanistan.

In addition, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c), extends Longshore benefits to employees working on the outer continental shelf of the United States, often at off-shore drilling facilities. *See, e.g., Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 1472 (2011). The Nonappropriated Fund Instrumentalities Act, codified as subchapter II of Federal Employees Compensation Act, 5 U.S.C. §§ 8171-93, extends LHWCA coverage to civilian employees in post exchanges, service clubs, and similar facilities of the Armed Forces. *See, e.g., Wilder v. United States*, 873 F.2d 285, 287-88 (11th Cir. 1989).

The interpretative question in this case can be briefly stated. Roberts was injured while working for Sea-Land Services at its Alaska marine terminal in 2002. He filed an LHWCA claim for disability benefits. After making some initial payments, the carrier contested coverage. An Administrative Law Judge ruled in Roberts' favor in October 2006 and issued a compensation order.

The LHWCA disability benefit is based on the claimant's weekly wage at the time of injury, 33 U.S.C. §§ 908 & 910, but may not exceed 200 percent of the national average weekly wage as determined by the Department of Labor. § 906(b)(1). At issue in this case is whether that ceiling is based on the

national average as of the date of injury or the date of the award.

Section 906(c) addresses this issue and states that the Secretary of Labor's determination of the average wage for the current fiscal year,

> shall apply to employees or survivors *currently receiving compensation* for permanent total disability or death benefits during such period, as well as those *newly awarded compensation* during such period.

33 U.S.C. § 906(c) (emphasis added).

The Ninth Circuit Court of Appeals held that, as a matter of statutory construction of § 906(c), "awarded compensation" did not refer to the ALJ's compensation order. According to the court below, "Congress apparently used 'awarded compensation' and 'entitled to compensation' to mean the same thing." *Roberts v. Dir., Office of Workers' Comp. Programs*, 625 F.3d 1204, 1207 (9th Cir. 2010). Roberts became entitled to compensation when he was injured. The court therefore concluded that Roberts' compensation was capped at 200 percent of the national average weekly wage as computed by the Secretary of Labor for FY 2002. *Id.* at 1208.

The court acknowledged, but declined to follow, *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997), which held that the date of the ALJ's compensation order was determinative under § 906(c). 625 F.3d at 1207-08. The Eleventh Circuit has since held that the date of a formal award or compensation order is the operative date for calculating the cap. *Boroski v.*

DynCorp Intern., No. 11-10033, 2011 WL 5555686, at *1 n.1 (11th Cir. Nov. 16, 2011). The Eleventh Circuit explicitly rejected the Director's argument "that it is the date of onset of the disability, and not the date on which a permanently totally disabled worker is awarded compensation, that determines the worker's applicable maximum compensation, adjusted annually thereafter." *Id.* at *7.

AAJ respectfully submits that the court below erred. Both the plain text of § 906(c) and the underlying purposes of the Act require that the maximum benefit be set at twice the national average weekly wage at the time the compensation order actually awards benefits.

II. THE PLAIN MEANING OF 33 U.S.C. § 906(C) REQUIRES THAT THE CAP ON PERMANENT DISABILITY BENEFITS BE BASED ON THE NATIONAL AVERAGE WEEKLY WAGE CURRENT AT THE TIME OF AN ACTUAL AWARD OR COMPENSATION ORDER, NOT THE TIME OF THE INJURY.

A. The LHWCA Defines "Award" As a Compensation Order.

Matters of statutory construction, of course, "begin[] with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Where the text provides a clear answer, interpretation "ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

The court below incorrectly stated that the LHWCA "does not expressly define the terms 'award' or 'awarded.'" 625 F.3d at 1206. The court then

fashioned its own definition which equates "newly awarded" to "newly entitled to." *Id.* at 1207.

Congress did, in fact, define "award." Section 19(e) of the Act makes provision for an "order rejecting the claim or making the award (*referred to in this Act as a compensation order*)." 33 U.S.C. § 919(e) (emphasis added).

Moreover, in other provisions of the LHWCA, the phrase "entitled to" cannot logically be substituted for "awarded." For example, the Act requires that compensation "be paid periodically, promptly, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted by the employer." 33 U.S.C. § 914(a) (emphasis added). The implementing regulations promulgated by the Department of Labor similarly provide for "payment of compensation without an award." 20 C.F.R. § 702.231. Under the Ninth Circuit's definition, such provisions would require payment of compensation without entitlement to compensation.

In addition, to make the first part of § 906(c) consistent with its interpretation of "award," the lower court declared Roberts to be "currently receiving compensation for permanent total disability" in 2002 for purposes of § 906(c), even though Sea-Land Services never paid Roberts any such compensation. In the court's view, "[t]he 'currently receiving' clause of section 6(c) unambiguously refers to the period during which an employee was *entitled* to receive compensation for permanent total disability, *regardless of whether his employer actually paid it.*" 625 F.3d at 1209 (emphasis added). The fact that the court's

interpretation of "award" forced it into a zen-like reading of the rest of the sentence strongly indicates that the court's reading of the plain text simply went astray. "Awarded" means actually awarded; "receiving" means actually receiving.

The lower court, however, attached significance to two subsections of § 908 that use "award" and "awarded" "to refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal order of compensation." 625 F.3d at 1206-07 (citing § 908(c)(22) (defining the "award" for loss of certain body parts) and § 8(c)(20) (referring to amount awarded for serious disfigurement of the face, head, or neck)).

Those subsections are simply part of a schedule of benefits for specific injuries. Congress' use of the term "award" there is not definitional. Nor do the provisions support the proposition that an "award" occurs at the time of injury. Indeed, the text suggests that some decision with respect to entitlement must follow the fact of injury.

In addition, it is not the case that there is no compensation order where the employer/carrier has not contested a claim. This Court has noted that "[e]mployers are not required to contest their liability in order to obtain a formal compensation award." *See Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 539 (1983). The Act provides that after a claim has been filed, notice has been given to the employer and no hearing has been ordered within 20 days, "the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim." 33 U.S.C. § 919(c). The provisions cited by the lower

court which appear to require payment to a claimant without a formal compensation order do not mean that no order will be entered. They simply mean that the employer, if not contesting the claim, shall not delay payments while awaiting the entry of such an order.

B. The Usual and Common Usage of "Award" In a Legal Context Refers To a Formal Determination.

Even setting aside Congress' definition of "award" as "compensation order" in 33 U.S.C. § 919(e), the ordinary meaning of "award" denotes some formal determination of entitlement. It does not simply mean "entitled to."

This Court has stated that legal terms used by Congress in the LHWCA are to be interpreted "to have the meaning generally accepted in the legal community at the time of enactment." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (construing "burden of proof"). The verb "award," this Court recently pointed out, has a settled meaning in the litigation context:

> It means "[t]o give or assign *by* sentence or judicial determination." *Black's Law Dictionary* 125 (5th ed.1979) (emphasis added); *see also Webster's Third New International Dictionary* 152 (1993) ("to give *by* judicial decree" (emphasis added)).

Astrue v. Ratliff, --- U.S. ----, 130 S. Ct. 2521, 2526 (2010) (construing the Equal Access to Justice Act).

> The plain meaning of the word "award" . . . is thus that the court shall "give or assign by . . . judicial determination" to the "prevailing party."

Id. There is no indication that in § 906(c) Congress intended anything other than the word's plain meaning.

C. The Legislative History Confirms That Congress Intended the Maximum Benefit Limitation to Be Calculated As of the Time of the Actual Award, Not When a Worker Is Injured.

33 U.S.C. § 906(c) originated in the the 1972 amendments to the LHWCA, which replaced a fixed dollar cap on disability benefits with the current cap based on the national average weekly wage.

The legislative history indicates that Congress did not intend to base this cap on the national average weekly wage in place on the date of injury. Such an interpretation would set a different ceiling for different claimants depending upon their year of injury. Instead, as the House Report accompanying the legislation explains, the maximum for all recipients would rise with increases in the national average. After describing the phase-in of the maximum from 125 percent by steps to 200 percent of the national average weekly wage, the House Report states:

> The bill also requires an annual redetermination by the Secretary which will allow any increase in the national

> average weekly wage to be reflected by an appropriate increase in compensation payable under the Act. . . . These employees will receive annual increases based on percentage increases in the national average weekly wage.

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, H.R. Rep. No. 92-1441, at 2 (1972), 1972 U.S. Code Cong. & Admin. News, 4698, 4700.

Similarly, the Senate Committee on Labor and Public Welfare, in its section-by-section analysis, indicated that "newly awarded compensation" refers to those who are not only entitled to compensation but who actually begin receiving it.

> Subsection (d)[§ 906(c) of the Act] states that determinations of national average weekly wage made with respect to a period apply to employees or survivors currently receiving compensation for permanent total disability or death benefits, as well as those *who begin receiving compensation for the first time* during the period.

S. Rep. No. 92-1125, at 18 (1972) (emphasis added). *See also Dir., Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 43 (1979). Clearly Congress did not intend "newly awarded compensation" to mean "newly injured" or "newly entitled to compensation." The Senate report explicitly states that "newly awarded compensation" means "receiving compensation for the first time."

III. THE POLICY AND PURPOSE UNDERLYING THE LHWCA REQUIRE THAT THE STATUTORY MAXIMUM BE MEASURED AS OF THE DATE OF THE COMPENSATION ORDER, NOT THE DATE OF INJURY.

A. The LHWCA Is To Be Construed Liberally To Achieve Its Purposes.

This Court has long made clear that the Act is to be construed with a view toward achieving its compensatory purposes:

> The measure before us, like recent similar legislation in many states, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be *construed liberally in furtherance of the purpose for which they were enacted* and, if possible, so as to avoid incongruous or harsh results.

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932) (emphasis added). *See also Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 200 (1952) (The LHWCA "is a humanitarian act, and . . .

should be construed liberally to effectuate its purposes."). Over the course of decades, this Court has repeatedly and consistently restated this rule of construction. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Reed v. S.S. Yaka*, 373 U.S. 410, 415 (1963); *Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977); *Dir., Office of Workers' Comp. Programs v. Perini N. River Assoc.*, 459 U.S. 297, 316 (1983).

B. Measuring the Benefits Cap as of the Date Benefits are Awarded Furthers the Act's Purpose, Which Is To Provide Sufficient Support To Workers Who Have Lost Earning Capacity, Rather Than Making the Worker Whole.

It is a "cardinal principle of damages" in the law of torts that compensatory damages are awarded for the purpose of "repairing plaintiff's injury or . . . making him whole as nearly as that may be done by an award of money." 4 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 25.1, at 490 (2d ed. 1986). Traditionally, the tort suit aims at "returning to the pre-tort status quo." John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law For the Redress of Wrongs*, 115 Yale L.J. 524, 604 (2005). Thus, in tort actions for personal injury, the date of injury is a critical baseline for damages.

Workers' compensation claims are a different matter. Like state worker compensation statutes, the LHWCA is neither an indemnity statute nor a replication of the common law cause of action for negligent injury, such as the right of action Congress provided to seamen under the Jones Act, 46 U.S.C.

§ 688. Instead, disability payments under the LHWCA are "compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 126 (1997). The essence of disability, under the Act, "is economic, not physical." *Id.* at 125.

The level of benefits is not set to make the claimant whole, but to provide sufficient monetary support to keep the injured worker from becoming dependent upon the state or society.

As the California Supreme Court explained,

> The purpose of the [workers compensation] award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability [by] assuring the injured workman subsistence while he is unable to work.

Dep't of Rehab. v. Workers' Comp. Appeals Bd., 70 P.3d 1076, 1087 (2003) (internal quotations omitted). *See also HDV Constr. Sys, Inc. v. Aragon*, 66 So. 3d 331 (Fla. Dist. Ct. App. 2011) ("The purpose of workers' compensation is to provide statutorily-limited sustenance and medical benefits . . . so that these expenses are not visited on society at large."); *Delahoussaye v. Live Oak Gardens, Ltd.*, 21 So. 3d 1060, 1062-63 (La. Ct. App. 2009) (Workers' compensation seeks to provide "basic subsistence levels thought to be reasonable and economically feasible, not to replace wages at pre-injury levels.").

The relevant baseline for determining the appropriate amount for the claimant's support is not the date of injury, which may be years in the past. It is instead the date of the compensation order.

In setting the maximum disability benefit, Congress looked to the National Commission on State Workmen's Compensation Laws, which Congress had created to assess whether state compensation systems provided "an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment." 29 U.S.C. § 676(a)(2) (1976).

One of the most important recommendations in the Commission's landmark report was that maximum disability benefits "be at least 200 percent of the State's average weekly wage." The Report of the National Commission on State Workmen's Compensation Laws Recommendation 3.9 (July 1972). Significantly, the Commission recommended that, "for all maximum weekly benefits, the maximum be linked to the State's average weekly wage *for the latest available year* as determined by the agency administering the State employment security program." *Id.* at R. 3.10. (emphasis added) Congress adopted these recommendations in amending the LHWCA to add 33 U.S.C. § 906(c). *Dir., Office of Workers' Comp. Programs v. Boughman*, 545 F.2d 210, 215 n.15 (D.C. Cir. 1976).

The few reported state judicial decisions to address this issue indicate adoption of this recommendation. *See Americana Dutch Hotel v. McWilliams*, 733 So. 2d 536, 537 (Fla. Dist. Ct. App. 1999) (Florida workers compensation total benefits "shall not exceed the maximum weekly compensation

rate in effect at the time of payment"); *Dunbar v. Tammelleo*, 673 A.2d 1063, 1067 (R.I. 1996) (claimant's benefits limited by statute to 150% of the average state weekly at the time of the award); *Nielson v. State, Indus. Special Indem. Fund*, 684 P.2d 280, 285 (Idaho 1984) (claimant award limited to 90% of the currently applicable average weekly wage).

C. Basing the Maximum Benefit On the Date of Injury Provides a Financial Incentive for Employers/Carriers To Contest and Delay Payment, Contrary to the Purpose of the LHWCA.

1. Speedy and Certain Payment of Benefits Is An Essential Feature of the LHWCA.

The central purpose of workers compensation legislation, including the LHWCA, is to provide prompt and certain payment of compensation owed under the Act. *See Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 461 U.S. 624, 636 (1983) (construing LHWCA consistent with its "goal of providing prompt compensation to injured workers"); *Pallas Shipping*, 461 U.S. at 539 (noting the "Act's aims of ensuring prompt payment to injured workers" without the burden of litigating claims"); *Potomac Elec. Power Co. v. Dir., Office of Workers' Comp. Programs*, 449 U.S. 268, 279 (1980) (LHWCA designed to afford "prompt relief without the expense, uncertainty, and delay that tort actions entail.").

Speed and certainty of compensation are not mere incidentals. Indeed, this Court has indicated that the speed and certainty of compensation under workers compensation legislation, compared to tort causes of action against employers, are essential to the constitutional validity of depriving injured workers of their common law remedies.

The industrial revolution brought progress and prosperity to America, but it also left legions of injured and maimed workers and destitute families. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50, 69-72 (1967). Tort law at the end of the 19th Century largely shielded the nation's industries from liability, erecting an "unholy trinity" of often-insurmountable defenses of contributory negligence, assumption of risk, and the fellow-servant rule. William Prosser, *Handbook of the Law of Torts* § 80 (4th ed. 1971); *see also* Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206, 223 (1952).

Beginning with New York in 1910 and spreading rapidly across the country, states enacted workers compensation statutes based on the economic doctrine that the cost of workplace injuries ought to be borne by employers, who are best able to prevent accidents and spread their cost. 1 Arthur Larson, *Larson's Workers' Compensation Law* § 4.30 (1998). Such legislation has been described as striking a "bargain" by which laborers gave up their right to seek full recovery in tort in exchange for quick and certain compensation through an administrative process. *See* 1B. Larson at § 1.04; Martha T. McCluskey, *The Illusion of Efficiency In Workers Compensation "Reform,"* 50 Rutgers. L. Rev.

657, 670 (1998). As the Eleventh Circuit recently observed, the LHWCA is premised on this same "bargain." *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1125 (11th Cir. 2011).

This Court upheld New York's statute, recognizing the bargain whereby the "employee is no longer able to recover as much as before in case of being injured through the employer's negligence, [but] has a certain and speedy remedy without *New York Central R. Co. v. White*, 243 U.S. 188, 201 (1917)." Indeed, the Court "doubted whether the state could abolish all rights of action, . . . without setting up something adequate in their stead." Two years later, this Court reaffirmed that abolition of the injured worker's common law cause of action does not violate due process "when established as a reasonable substitute for the legal measure of duty and responsibility previously existing." *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919).

After this Court held in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), that state workers' compensation programs could not apply to maritime workers within the federal admiralty jurisdiction, Congress enacted the LHWCA to provide workers' compensation for those workers. *See Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334, 335-37 (1953).

This Court has consistently maintained that the LHWCA, like workers compensation statutes, is based on a "quid pro quo" in which employees gave up the right of suit for damages for personal injuries in return for prompt and certain compensation payments under the Act. *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 131 (1995); *Washington*

Metro. Area Transit Auth. v. Johnson, 467 U.S. 925, 931-32 (1984); *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983); *Potomac Elec. Power*, 449 U.S. at 282; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

2. Fixing the maximum benefit to the date of injury provides a financial incentive for employer/carriers to contest liability and delay compensation.

In order to provide compensation with speed and certainty, the LHWCA contemplates that in most cases the employer will pay benefits owed to an injured worker under the Act without requiring the claimant to obtain a compensation order. *See* 33 U.S.C. § 914(a). Thus,

> [a] fundamental aspect of the Act is the expectation that employers will pay compensation promptly and directly without the necessity of a formal award.

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-1, at 381 (3d ed. 2001).

When an injured employee has lost more earning capacity than the maximum of 200 percent of the national weekly wage, using the national average that is current at the time of the compensation order encourages prompt voluntary payment. National average wages have risen annually without exception since 1951. *See* National Average Wage Index (2010), *available at* http://www.ssa.gov/oact/cola/AWI.html (last visited Nov. 16, 2011). An employer/carrier can therefore

anticipate that extended delay will likely result in a higher compensation award.

The Ninth Circuit's construction of § 906(c), however, points in exactly the opposite direction. If an employer/carrier is presented with a claim by a highly paid employee and is assured that its payment is already capped at twice the national average as of the date of injury, there is no incentive to pay the claim voluntarily. Indeed, the lower court's interpretation creates a financial incentive for the employer/carrier to controvert liability,[2] in the hope that the injured worker, facing mounting bills, may settle for a small amount.

The Eleventh Circuit rejected a proposed construction of the LHWCA that would have extinguished a claim for permanent total disability benefits if the employee dies prior to an award. Judge Hatchett explained:

> Under Dry Dock's interpretation of the Act, an employer might be inclined to delay payment for as long as possible, harboring the expectation that an employee's death would limit its liability. *Congress could not have intended such a result.*

Alabama Dry Dock & Shipbuilding Co. v. Dir., Office of Workers' Comp. Programs, 804 F.2d 1558, 1560 (11th Cir. 1986).

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[2] By filing notice of controversion of liability, the employer/carrier is exempt from interest or delay penalties up to the date of the award. 33 U.S.C. § 14(d) & (e).

AAJ submits that Congress similarly could not have intended to create a financial incentive for employers/carriers to contest liability and delay payment owed under the Act.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Date: November 21, 2011 Respectfully submitted,

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